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A TREATISE

ON THE LAW OF

MASTER AND SERVANT,

INCLUDING THEREIN

MASTERS AND WORKMEN

IN EVERY DESCRIPTION OF TRADE AND OCCUPATION;

With an Appendix of Statutes.

BY

CHARLES MANLEY SMITH,

Of the Middle Temple, Special Pleader.

LAW LIBRARY EDITION; WITH NOTES AND REFERENCES TO AMERICAN CASES.

"*Masters*, give unto your Servants that which is just and equal; knowing that ye also have a Master in Heaven."—*Col.* iv. 1.

"*Servants*, obey in all things your Masters according to the flesh; not with eye-service, as men pleasers; but in singleness of heart, fearing God."—*Col.* iii. 22.

"Servi sunt, imo homines: servi sunt, imo contubernales: servi sunt, imo humiles amici: servi sunt, imo conservi."—*Senec. Ep.* xlvii.

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PREFACE.

THERE are so few persons not interested in the law applicable to the relationship of Master and Servant, either in one capacity or the other, that the publication of a Treatise upon that subject may seem to most people to require but little apology. With *professional* men, however, the case is somewhat different. They have been so long accustomed, when any question of law arising out of the relationship of Master and Servant has been brought before them, to refer, if necessary, to works of *general* application, such as treatises on contracts, agency, or criminal law, or to digests, indices, and abridgments; that *they* may perhaps hardly have felt the want of a separate Work upon the law of Master and Servant. But it is conceived that even professional men may be more truly said to have become *used to the want* of such a Work, than not to have felt it. It is at least, to the existence of a strong impression upon the mind of the Author that such was the case, and that a book exclusively devoted to the subject he has attempted to elucidate *was wanted*, combined with a desire on his part to supply what he considered a deficiency in the list of legal publications, that the present Work owes its origin. In it he has attempted to concentrate all(*a*) that information upon the subject treated of which has hitherto been diffused through many books. How far he has succeeded in his object it is not for himself to determine. Whilst, however, on the one hand, he is well aware that many defects may, and not improbably will, be discovreed in the following Work; on the other hand, he ventures to express his hopes that it will not be found altogether use-

(*a*) A Chapter on the Law of Settlement by Hiring and Service was partially prepared but the addition of it would necessarily add much both to the size and price of this Volume. Upon further reflection, therefore, the Author has determined to omit it, and this the rather, as the subject daily decreases in importance, and questions upon it now seldom arise. See *post*, p. 2, n. (*b*).

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less, even to the members of his own Profession; who he trusts, will receive it with that indulgence which they are ever wont to accord to the efforts of their younger brethren. And if it shall be found by experience that the Author has so far succeded in his undertaking as to have acted the part of a pioneer only upon a path, hitherto, if not altogether untrodden, at least but imperfectly explored, he will be sufficiently compensated for his labours by the reflection that his leisure hours, which the present abnormal condition of his Profession has rendered more that usually numerous, have not been altogether misspent whilst devoted to the preparation of this Work.

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INTRODUCTION.

In treating of the Law applicable to the relationship of Master and Servant as it exists in England at the present day, it seems to be unnecessary to enter into any discussion of the various opinions which have been expressed by different authors as to the first origin of that relationship;(*a*) for since it is obvious that, in the complicated intercourse of modern society, a great proportion of the business of human life must be carried on through the instrumentality of others, and it is also clear that slavery does not now(*b*) exist, in any shape in England, where every man is, and (according to the memorable sentiment expressed in the will of Alfred the Great) it is fit that every Englishman should ever remain as free as his own thoughts, it seems to follow inevitably, not only that the relationship of master and servant must exist, but also *that wherever it does exist in this country it must be by virtue of some agreement, either express or implied, between the parties. [*xxvi] Puffendorf,(*c*) too, refers its first origin to contract: he says, "the first rise of servitude is owing to the voluntary consent of the poorer and more helpless persons, and is founded upon that common form of contract—*Do, ut facias.*"

But, whatever its origin, servitude, in some shape or other, has clearly existed from the remotest antiquity; and without inquiring into the condition of the slave amongst the ancient Grecians and Romans, which might be considered as irrevelant to the object more immediately in view in the following pages, it may be convenient to offer a few remarks upon the state of the slave, or vilein, in this country, whose condition had most of the incidents of slavery, and to trace the progress

(*a*) The curious on this subject may consult Puff. de Jure Nat. ac Gent., lib. 6, cap. 3, where various opinions are discussed; and see Co. Litt. 116 b; Bl. Com. vol. 1, ch. 14; Encyc. Brit. tit. "Slavery." Grotius divides servitude into perfect and imperfect, and, amongst the latter, classes mercinarii:—"Inter quos," he says, "ii qui in Anglia apprentisii dicuntur durante disciplinæ suæ tempore, proxime ad servilem conditionem accedunt." Lib. 2, cap. 5, sec. 30, and M. Barbeyrac, in his notes, refers to Thom. Smith de Republ. Anglic. lib. 3, cap. 10.

(*b*) During the Anglo-Saxon times, slaves were one of the principal English exports. Strabo, l. 4, p. 199 (ed. Paris, 1620); Barr. on Stat. 274; Russ. Mod. Eur., note to P. S. to Letter xx.

(*c*) Puff. lib. 6, cap. 3, sec. 4. Blackstone (vol. 1, ch. 14) says, "The relationship of master and servant is founded in convenience," and he evidently means that convenience induces men to enter into the contract, whence the relationship arises.

of English legislation with reference to that class of persons, commonly called servants and labourers, who in most respects supply the places formerly occupied by vileins, though their condition is far superior.

Both among the German Saxons and among the Anglo-Saxons, slaves or vileins were divided into two classes,—household slaves,(*d*) after the manner of the ancients, and predial, or rustic, who were transferred like cattle with the soil;(*e*) though there does not appear to have been much difference between the two as to their condition. The power of a master over his slaves appears not to have been unlimited among the Anglo-Saxons as it was among their ancestors. If a man beat out his slave's eye or teeth, the slave recovered his liberty; if he killed him, he paid a fine to the king, provided the slave died within a day after the wound or blow, otherwise it passed unpunished.(*f*)

Whether or not the feudal law had place at all among the Anglo-Saxons is a doubtful question;(*g*) but its introduction does not appear to have ameliorated the condition of the slaves or vileins, except in so far as it tended to promote the civilization of their masters, who, as long as villenage lasted, had an almost absolute power over them. Their service was uncertain and indeterminate, such as their lord thought fit to require, or, as some old writers express it, they knew not in the evening what they were to do in the morning;(*h*) they were bound to do whatever they were commanded. They were liable to beating, imprisonment and every other chastisement which their lord might prescribe, except killing and maiming. They were incapable of acquiring property for their own benefit, except by their lord's sufferance or permission,—the rule being, quicquid acquiritur servo acquiritur domino.(*i*) They were [*xxviii] themselves the subject of property; as such, saleable *and transmissible. If vileins regardant, they passed with the manor or land to which they were annexed, but they might be severed at the pleasure of the lord. If vileins in gross, they were hereditaments, or chattels real, according to their lord's interest being descendible to the heir when the lord was absolute owner, and transmissible to the executor when he had only a term of years in him. Lastly, the slavery extended to the issue if both parents were vileins, or if the father only was a vilein; our law deriving the condition of the child from that of

(*d*) In Kent's Comm., Lec. 32, vol. 2, p. 204, it is said that domestic slavery existed throughout the United States when they were colonies of Great Britain. "But," adds the learned author (p. 206,) "after the era of our Independence the principles of natural right and civil liberty were better known and obeyed, and domestic slavery speedily and sensibly felt the genial influence of the Revolution."

(*e*) See Hume's Hist. Engl., vol. 1, chap. 3, App. 1; Spel. Gloss. Verb. Servus; Russ. Mod. Eur., part 1, Letter viii.

(*f*) Leges Ælf. § 17. This seems to be borrowed from the Jewish law, Exod. xxi. 20, 21, 26, 27.

(*g*) See Hume's Hist. Engl., vol. 1, App. 2, to ch. 11; Hall. Mid. Ages, vol. 1, ch. 2, p. 2; Encyc. Brit. tit. Feodal System."

(*h*) Co. Lit. 1166.

(*i*) "Non potest aliquis" (says Glanvil) "in villenagio positus libertatem suam propriis denariis suis quærere quia omnia catalla cujuslibet nativi intelliguntur esse in potestate domini sui." Lib. 5, cap. 5. The benevolence of lords, however, in many cases, allowed their vileins to acquire property, (like the peculium of the Roman law,) with which they purchased their enfranchisement. As to the present applicability of the maxim in the text, see post, p. 80.

the father, contrary to the Roman law, in which the rule was, partus sequitur ventrem.(*i*) It was, however, only in respect to his lord that the vilein, at least in England, was without rights.(*k*) He might inherit, purchase, sue in the courts of law, if his lord did not interfere, and when sued as a defendant in a real action or suit wherein land was claimed, he might shelter himself under the plea of villenage. And he seems to have been admissible as a witness in England in all cases, except as against his lord, though this point is rather obscure.(*l*)

Such being the abject condition of the vilein, it is not to be wondered at, that as Christianity,(*m*) civilization, and commerce advanced, villenage should have gradually become extinct. It is not, however, necessary here to follow it in the several stages of its decline, or to trace the causes which led to its ultimate extinction. It will be sufficient to mention that the period of its final extinction in England (which was effected without any *actual interposition of the legislature),(*n*) is generally fixed about the latter end of Queen Elizabeth's reign, or soon after the accession of James I.(*o*). [*xxix]

As villenage gradually declined, the interposition of the legislature appears to have become necessary for the regulation of labourers and servants, who seem to have been inclined to avail themseves of their freedom by remaining totally idle unless induced to work by high wages. But the first statute upon the subject,(*p*) 23 Edw. 3, A. D. 1349, accord- [*xxx]

(*i*) See Lit. sec. 172, et seq., and Hargrave's famous argument in Somersett's case, 20 How. St. Tr. 1.

(*k*) Lit. sec. 189. (*l*) See Hall. Midd. Ages, vol. 1, ch. 2, p. 2.

(*m*) The doctrine that slavery was contrary to the principles of the Christian religion, is said to have been originally inculcated by Wycliff and his followers. Barr. on Stat. 280.

(*n*) See Barr. on Stat. 722-4. The case appears to have been otherwise in France, where Louis Hutin, in 1315, and Philip the Long, three years later, issued ordinances, declaring "that as all men were by Nature free born, and as their kingdom was called the kingdom of Franks, they determined that it should be so in reality as well as in name; therefore they appointed that enfranchisements should be granted throughout the whole kingdom upon just and reasonable conditions." See Roberts. Introd. to Hist. Chas. V., sect. 1 and 4, and note xx., ib. He cites Ordon., tom. 1, pp. 583, 653. Hallam, however, mentions as a fact not generally known, that predial servitude was not abolished in all parts of France till the Revolution, at the close of the last century. Mid. Ages, ch. 2, p. 2, note, p. 150, 9th edit. The feudal law was abolished in France by a decree of the National Assembly, 4th August, 1789. See the Baron de Bode's case, 8 Q. B. 246. It is remarkable, that till about the same period, or even later, there were in Scotland many colliers, coalbearers, and salters in a state of slavery or bondage, bound to the collieries and salt works, where they worked, for life, and transferrable with the collieries and salt works when the original masters had no further use for them. These men were not all free till an act of Parliament was passed (39 Geo. 3, c. 56), declaring them to be so, for they appear to have neglected to avail themselves of an act which had been passed nearly a quarter of a century before (15 Geo. 3, c. 28,) which enabled them to obtain their freedom, by going through certain forms.

(*o*) One of the last instances in which villenage was insisted on was Crouch's case, which happened 10 & 11 Eliz., and is reported in Dyer, 266, pl. 11, and 282, pl. 32. Mr. Hargrave however, in his argument in Somersett's case, 2 How. St. Tr. 40, mentions several later cases—one so late as Hil. T., 15 Jac. 1, since which, he says, the claim of villenage has not been heard in courts of justice.

(*p*) See Barrington on Stat. p. 206. He calls this a *supposed* statute, because the intervention of the Commons is not mentioned, and the introductory part seems to justify this observation, for the style is like that of an ordinance of the King in Council; and in 25 Edw. 3, stat. 1, it is recited, as having been "*ordained*" by the King, and by as-

ing to the preamble, was caused by the great plague which happened about that time, and which created such a scarcity of servants that many "seeing the necessities of masters would not serve unless they might receive excessive wages; and some rather willing to beg in idleness than by labour to get their living."(*q*) Accordingly, various statutes were passed with a view to compel labourers and servants to work, and regulate their wages,(*r*) diet,(*s*) apparel,(*t*) and games.(*u*) And some to prevent people of small means making a great retinue of people, and giving them hats and other liveries,(*v*) a custom which *appears to have grown up, having for [*xxx] its object mutual maintenance in quarrels, and which was not confined to noblemen.(*tt*)

At the commencement of the reign of Queen Elizabeth, however, all former acts regulating wages were repealed, "chiefly for that the wages and allowances limited and rated in many of the said statutes were in divers places too small, and not answerable to that time respecting the advancement of prices of all things belonging to the said servants and labourers," and power was given to justices of the peace and magistrates of cities and burghs to rate wages and fix prices of work.(*uu*) Acts of parliament conferring similar powers were also passed in Scotland,(*vv*) where their provisions were found so beneficial that they were afterwards extended to colliers.(*w*) But so much of those acts as authorised and empowered justices of the peace and magistrates of cities and burghs to rate wages and fix prices of work for artificers, labourers, and craftsmen, has

sent of the prelates, &c., and "others of his Council." See also 2 R. 2, c. 8. Moreover, Barrington adds, in a note, that it appears from Dugdale that no parliament was held, 23 Edw. 3, because of the plague. But the 23 Edw. 3, appears to have been treated as a statute. F. N. B. 267, B. See note to Co. Litt. 42 *b*. The point, however is of little importance, as it was re-enacted or confirmed the following year (25 Edw. 3, st. 1), and is now virtually repealed by 5 Eliz. c. 4.

(*q*) This effect of the plague was not confined to servants, for it appears that parish priests having become "very scant after the pestilence," an act of Parliament was passed to regulate their wages. 36 Edw. 3, c. 8.

(*r*) 25 Edw. 3, st. 1; 34 Edw. 3, c. 9, 10, 11; 2 Rich. 2, c. 8; 12 Rich. 2, c. 4; 4 Hen. 5, c. 4; 2 Hen. 6, c. 14; 6 Hen. 6, c. 3; 8 Hen. 6, c. 8; 23 Hen. 6, c. 13.

(*s*) 37 Edw. 3, c. 8. See 3 Inst. 201.

(*t*) 37 Edw. 3, c. 8, 9, 11, 14; 3 Edw. 4, c. 5; 22 Edw. 4, c. 1. These two, however, were not confined to servants, and they were repealed 24 Hen. 8, c. 13 and 1 Jac. 1, c. 25. See 3 Inst. 199.

(*u*) 12 Rich. 2, c. 6; 11 Hen. 4, c. 4 (see 17 Edw. 4, c. 3); 11 Hen. 7, c. 2; 33 Hen. 8, c. 9. See now 8 & 9 Vict. c. 109.

(*v*) 1 Rich. 2, c. 7; 20 Rich. 2, c. 1, 2; 1 Hen. 4, c. 7; 2 Hen. 4, c. 21; 7 Hen. 4, c. 14; 13 Hen. 4, c. 3; 8 Hen. 6, c. 4; 8 Edw. 4, c. 2. In 12 Edw. 4, it was found necessary to pass an act of Parliament for enabling the Prince of Wales to give liveries to other than menial servants, 12 Edw. 4, c. 4. These acts were repealed by 3 Car. 1, c. 4. Lord Coke (3 Inst. 200) says, "William of Malmesbury comparing Englishmen and Normans together, saith, that in his time the English manner was to sit bibbing whole hours after dinner; and that the Norman fashion was to walk the streets with great troops with idle and loose serving men following them, both which were causes of many disorders and outrages."

(*tt*) By the statute 34 & 35 Hen. 8, c. 1, (A. D. 1542-3), it was enacted, not only that the Bible should not be read in English in any church, but also that no women or artificers, prentices, journeymen, servingmen of the degree of yeoman or under, husbandmen, nor labourers should read the New Testament in English. This act, however, which was chiefly directed against Tindal's translation of the Bible, was repealed about four years afterwards. 1 Edw. 6, c. 12.

(*uu*) 5 Eliz. c. 4. See this act post, p. 354, and see 1 Jac. 1, c. 6, explaining it.

(*vv*) 22 Parl. Jac. 6, c. 8; 1 Parl. Car. 1, c. 38. (*w*) 39 Geo. 3, c. 56.

since been altogether repealed;(x) and it is remarkable as shewing the entire change of public opinion upon this subject, that in the act for the arbitration* of disputes between masters and workmen, which was passed in 1824,(y) there is a special provision, that nothing therein contained shall authorize justices, acting in execution of that act, to establish a rate of wages without the mutual consent of both master and workmen. [*xxxii]

The statute of 5 Eliz. c. 4, only gave power to the magistrates "to *limit, rate, and appoint*" wages, and gave no power to order payment of them. That power was, however assumed by the magistrates, and their assumption of it was, by construction of law, held to be legal.(z) But the statute being deficient, as it extended only to such wages as should be rated, and to servants in husbandry, and contained no power to admit the servant's oath in evidence; another act was passed in 20 Geo. 2,(a) giving more extensive powers to magistrates, and extending those powers to disputes between masters and various other descriptions of servants than those mentioned in the statute of Elizabeth. And this act has been found so beneficial in some respects, that although, as we have seen, repealed as to rating wages, several other acts have been subsequently passed extending the powers conferred by it in other respects.(b)

The Statute Book also contains, in addition to the act relating to the arbitration of disputes between masters and workmen,(c) an act consolidating the law relating to combinations amongst masters and workmen,(d) and *also an act relating to the payment of wages otherwise than in money, commonly called the Truck Act,(e) which are applicable to most trades; a large number of statutes applicable to masters and servants in particular trades, which it is not thought necessary in this place to refer to at greater length, as they are not of general interest; the principal of those now in existence will be found in the Appendix. [*xxxiii]

Acts of parliament have also been passed at various times for the regulation of the employment of children and young persons in cotton and other factories, and for the preservation of their health and morals.

The first act for this purpose was passed in 1802,(f) and was amended in 1819.(g.) Further enactments on the subject were made in 1825,(h) the provisions of which having been defeated for want of form, it was found necessary again to amend the law in 1829.(i) At the commence-

(x) 53 Geo. 3, c. 40. Several acts which had been passed in the reign of Geo. 3, for empowering justices to regulate the wages of persons employed in the manufacture of silk were repealed 5 Geo. 4, c. 66. The provisions contained in them "having been found vexatious and injurious in their operation." The 29 Geo. 2, c. 33, s. 1, which empowered justices to make rates for the payment of wages to weavers and others employed in the woollen manufactures was repealed 6 Geo. 4, c. 129.

(y) 5 Geo. 4, c. 96, post, p. 319.

(z) Post, p. 300, note (a).

(a) 20 Geo. 2, c. 19, post, p. 301.

(b) As to masters and workmen see 27 Geo. 2, c. 6; 31 Geo. 2, c. 11, s. 2; 6 Geo. 3, c. 25; 4 Geo. 4, c. 34; 10 Geo. 4, c. 52. See post, p. 300. As to masters and apprentices, see 32 Geo. 3, c. 57, s. 11; 33 Geo. 3, c. 55; 4 Geo. 4, c. 29; 4 Geo. 4, c. 34; 5 & 6 Vict, c. 7.

(c) 5 Geo. 4, c. 96, post, p. 318.

(d) 6 Geo. 4, c. 129, post, p. 331.

(e) 1 & 2 Wm. 4, c. 37, App. p. 411.

(f) 42 Geo. 3, c. 73, App. p. 400.

(g) 59 Geo. 3, c. 66; 60 Geo. 3, c. 5.

(h) 6 Geo. 4, c. 63.

(i) 10 Geo. 4, c. 51.

ment of the reign of Wm. 4, however, all these acts (except the first) were repealed, and other regulations enacted in lieu thereof.(*k*) But a few years afterwards those regulations were in their turn also repealed, and another act passed, which (as amended by subsequent acts) now regulates the law upon the subject.(*l*)

The provisions contained in these acts, which are applicable to young persons, (that is persons above thirteen and under eighteen years of age),(*m*) were first *extended to females above that age in 1844.(*n*) But as it is thought advisable to print these acts in extenso in the Appendix, it is not considered necessary to advert further to them in this place.

[*xxxiv]

The most recent statute upon the Law of Master and Servant, is that passed in the last session of parliament for the protection of apprentices and servants, which will be further adverted to hereafter,(*o*) and which for the first time rendered it a misdemeanor for any master or mistress, legally bound to supply necessary food and clothing or lodging to an apprentice or servant, wilfully, and without lawful excuse, to refuse or neglect to provide the same.

(*k*) 1 & 2 Wm. 4, c. 39.

(*l*) 3 & 4 Wm. 4, c. 103, amended by 7 & 8 Vict. c. 15; 10 & 11 Vict. c. 29, (see Ryder v. Mills, 3 Exc. 853); 13 & 14 Vict. c. 54. See these acts in the Appendix.

(*m*) 7 & 8 Vict. c. 15, s. 73.

(*n*) 7 & 8 Vict. c. 15, s. 32, and see 13 & 14 Vict. c. 54.

(*o*) 14 & 15 Vict. c. 11, post, p. 116, and see the act in the Appendix.

A TREATISE

ON THE

LAW OF MASTER AND SERVANT.

CHAPTER I. [*1]

THE PARTIES TO THE CONTRACT.—WHO MAY CONTRACT THE RELATIONSHIP OF MASTER AND SERVANT.

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GENERALLY.

As a general rule, every person of the full age of twenty-one years, and not under any legal disability, is capable of becoming either a master or a servant. But in order that a contract of hiring and service may be legally binding,(*a*) it is necessary that at the time such a contract is entered into, the party about to be hired should be free from any other engagement incompatible with that into which he is about to enter: in other words, he must be *sui juris.*

Thus, whilst a settlement could be gained by hiring *and service,(*b*) it was held, that the party who hired himself as a servant must, in [*2] order to acquire a settlement by service under that hiring, have been, at the time of hiring, disencumbered from any other relation which might interfere with or defeat the performance of his engagement; for, unless

(*a*) It is not always necessary to prove a *legally binding contract* of hiring: a service de facto is, as we shall hereafter see, sufficient for many purposes.

(*b*) By stat. 4 & 5 Wm. 4, c. 76, s. 64, no settlement can be gained by hiring and service, or by residence under the same since 14th August, 1834.

he were so, he was not free to contract, and if not free to contract, he could not be lawfully hired.

Therefore an apprentice(*c*) could not, whilst his indentures remained in force (and they were not then dissolved by the bankruptcy(*d*) of the master) lawfully hire himself to another master so as to gain a settlement by service under such hiring. So a deserter from the king's marine forces;(*e*) and an invalid soldier in the king's service who had leave of absence upon agreement to relinquish his pay for the time, which leave was renewed from time to time, were also held incapable of making a valid contract of hiring and service so as to gain a settlement thereunder, since they were not sui juris, so as to be able to contract, being under a legal disability in consequence of having entered into a different obligation.(*f*)

And similar principles were held to be applicable to militiamen and their substitutes, and members of volunteer corps, such persons being held to be incapable of entering into a valid contract of hiring and service; unless, at the time they did so, they informed their master, or he knew of their liability to be called on to serve, and he agreed in such case to dispense with their personal services.(*g*)

[*3] *MARRIED WOMEN.

A married woman is in general incapable of entering into any contract which will be binding upon her at law, and cannot therefore take an apprentice, as she cannot legally bind herself to instruct him.(*h*) In entering into contracts, she is generally regarded as the agent of her husband, and he will generally be bound by such contracts. When therefore a married woman hires servants, her husband will, in most cases, be liable to pay the wages. And it makes no difference in his liability, that the wife has entered into and signed an agreement under seal, where he has not authorized her to do so.

In a case,(*i*) therefore, where the defendant's wife by an agreement under seal to which he was no party, and which he had not given her any *written* authority to enter into, agreed to take the plaintiff with her to Barbadoes, in the capacity of a waiting maid, to pay her 21*l.* per annum as long as she continued in her service, and to pay for her passage to Barbadoes, and other incidental expenses, as also her passage home to

(*c*) Rex v. Hindringham, 6 T. R. 557. And see Rex v. Stowmarket, 9 East, 211; Rex v. Dunton, 15 East, 352, which, although not cases of apprenticeship, illustrate the text.

(*d*) Rex v. Puckington, 1 Str. 582; and see Thomas v. Williams, 1 A. & E. 485. Bankruptcy of the master does now enure to a complete discharge of an indenture of apprenticeship, 12 & 13 Vict. c. 106, s. 170; and see ibid., as to return of apprentice fee.

(*e*) Rex v. Norton, 9 East, 206. (*f*) Rex v. Beaulieu, 3 M. & S. 229.

(*g*) Rex v. Westerleigh, Burr. S. C. 753; Rex v. Winchcombe, 1 Doug. 391; Rex v. Holsworthy, 6 B. & C. 283; Rex v. Taunton, St. James, 9 B. & C. 831; Rex v. Elmley Castle, 3 B. & Ad. 826; Rex v. St. Mary-at-the Walls, Colchester, 5 B. & Ad. 1023; Rex v. Witne ham, 2 A. & E. 648.

(*h*) Rex v. Guildford, 2 Ch. 284. As to how far a married woman may act as a feme sole in the city of London, see Beard v. Webb, 2 Bos. & P. 93.

(*i*) Wh te v. Cuyler, 1 Esp. 200; S. C. 6 T. R. 176.

England, in case she should be dismissed from her situation: It was held that the defendant was liable to an action of *assumpsit*, for the amount of the plaintiff's wages, and her passage money home to England, which had not been paid, although it was objected on the part of the defendant, that the form of action was misconceived, and that it should have been on the deed.

The liability of the husband, however, upon contracts of hiring entered into by the wife, depends entirely upon the principle, that the wife was his agent, and had authority from him to enter into the contract.(*k*) But it is not necessary, in order to render him liable, to show that such authority was *expressly* given to the wife. It is sufficient if it can be *implied* from circumstances. In all cases, the question whether or not, she had authority *to bind him is one proper for the consideration of a jury.(*l*) And so long as husband and wife cohabit, it will be presumed that [*4] she had authority to hire such servants as were necessary or suitable to the condition in life of her husband, and he will be liable to pay their wages.(*m*) When they do *not* cohabit, the presumption is rather the other way, viz., *against* the husband's liability upon his wife's contracts;(*n*) but, in both cases the presumption may be rebutted—in the former case, by evidence that the husband had expressly forbidden his wife to hire the servant, and the servant knew that he had done so,(*o*) or by shewing that during his temporary absence, he allowed and paid his wife an adequate sum for the payment of all necessary expenses, and that the servant knew that he did so(*p*)—in the latter case, by shewing that the wife was not reasonably provided for, considering the circumstances of the husband.(*q*) For, if when husband and wife are separated, she receive either from her husband or any other source,(*r*) an adequate sum for her separate maintenance, she has no implied authority to pledge her husband's credit, and in such case it is not necessary to prove that the party trusting the wife had notice of her separate maintenance, in order to exempt the husband from liability.(*s*) But when a married woman is separated from her husband, she does not thereby regain the capacity to enter into contracts that will be binding upon her, as a *feme sole*, even though the separation be by deed, and, therefore, although in some such

(*k*) Manby v. Scott; Montague v. Benedict, 2 Smith's L. C. 245; Mizen v. Pick, 3 M. & W. 481; Chit. on Contr. 152.

(*l*) Lane v. Ironmonger, 13 M. & W. 368. See Read v. Legard, 6 Exc. 636, where a husband was held liable for necessaries supplied to his wife during his lunacy.

(*m*) See Etherington v. Parrott, 1 Salk. 118, and cases cited, 2 Smith's L. C. 283. This presumption of agency, arising from cohabitation, is not confined to the case of a lawful wife—it extends to the case of any woman with whom the defendant cohabits, and whom he allows to assume his name, although not his wife. Watson v. Threlkeld, 2 Esp. 637.

(*n*) Reed v. Moore, 5 C. & P. 200; Ozard v. Darnford, 1 S. N. P. 294; Mainwaring v. Leslie, M. & M. 18; Clifford v. Laton, M. & M. 101.

(*o*) Etherington v. Parrott, ubi supra. (*p*) Holt v. Brien, 4 B. & Ald. 252.

(*q*) Clifford v. Laton, M. & M. 101.

(*r*) Ibid. But a pension revocable at pleasure is not a sufficiently stable fund for the purpose. Thompson v. Hervey, 4 Burr. 2177.

(*s*) Mizen v. Pick, 3 M. & W. 481; Holder v. Cope, 2 C. & K. 437; Reeve v. Marquis of Conyngham, 2 C. & K. 444.

[*5] *cases the husband is not liable, yet no more is she; parties entering into contracts with her under such circumstances, trust to her honour.(*t*)

So, on the other hand, the husband may take advantage of any contract of service entered into by his wife, and, therefore, where a woman enters into service, her husband is the person to whom her wages should be paid, as he is entitled to the profits resulting from her work and labour, and she cannot in general even join him in an action upon a contract made during the marriage for her work and labour,(*u*) though it is said she may do so where she is the meritorious cause of action, as where the cause arises from her personal labour and skill.(*v*)

There is, however, one case(*w*) in which it was held, that a married woman who was residing with her father, having been seduced, the father might bring an action against the person who had seduced her, although it was objected that the action was founded on the loss of service, and the daughter being a married woman, she could not enter into a valid contract of service, and, therefore, the father was not legally entitled to her services; but it was held, that a service in fact was sufficient to support the action, especially as the husband had not interfered.

Where the husband is civilly dead, as in case of his being transported for life, or a limited term, the wife may contract as a *feme sole*, and sue or be sued upon her contracts.(*x*) And it makes no difference in this respect that he is at the Hulks in this country, and not actually sent abroad.(*y*)

In equity a married woman, having separate property is for many purposes regarded as a feme sole, and her contracts are held to bind her separate estate.(*z*) And it appears to be the better opinion, that it is not [*6] *necessary that a contract should be in writing in order to do so where that is not rendered necessary by any statute,(*a*) nor, where it is in writing, is it necessary that it should refer to the separate property in order to bind it.(*b*)

INFANTS.

Although infants labour under a general incapacity to enter into absolutely binding contracts with other persons,(*c*) yet they may make some contracts which will be binding upon them until avoided by them—such as contracts for their benefit.(*d*) Infants may also make contracts for necessaries, which will be absolutely binding upon them.(*e*)

What are necessaries is a mixed question of law and fact,(*f*) and will

(*t*) Marshall v. Rutton, 8 T. R. 545.
(*u*) Buckley v. Collier, 1 Salk. 114.
(*v*) Brashford v. Buckingham, Cro. Jac. 77, 205; and see Nurse v. Wills, 4 B. & Ad. 743, S. C. in error, 1 A. & E. 65.
(*w*) Harper v. Luffkin, 7 B. & C. 387. (*x*) Chit. on Contr. 169.
(*y*) Ex parte Franks, 7 Bing. 762.
(*z*) Bell v. Hyde, Prec. Chan. 328; Norton v. Turvill, 2 P. Wms. 144; Grigby v. Cox, 1 Ves. 517. (*a*) Owens v. Dickinson, Cr. & Ph. 55. (*b*) Ibid.
(*c*) Bac. Ab. tit. "Infancy," I.
(*d*) Maddon v. White, 2 T. R. 161; Rex v. Shinfield, 14 East, 541.
(*e*) Bac. Ab. tit. "Infancy," I.; and see Zouch v. Parsons, 3 Burr. 1801; Drury v. Drury, 5 Bro. Parl. Cas. 570. (*f*) Wharton v. M'Kenzie, 5 Q. B. 612.

be decided by the court and jury taking into consideration the station in life of the infant.(*g*)

Livery for the servants of an infant who was a captain in the army, has been held to come within the description for necessaries, and the infant was held liable to pay for it.(*h*) Similar principles would apply to a claim for wages.

A contract of apprenticeship is generally to be regarded as for the benefit of an infant, and, therefore, he may make a legal binding contract of apprenticeship.(*i*) If he could not do so he could not be bound at all, for a *father has no common law authority to bind his infant son an apprentice without his consent.(*k*) [*7]

So a contract of hiring and service may be beneficial to an infant, and would, generally speaking, be binding upon him, and may be made even with his own father.(*l*) Such a contract would subject him to the statutable regulations applicable to masters and servants, although he might not be liable to any action upon the contract.(*m*) And it would give him a right of action for wages earned.(*n*) For if an infant of five years of age or other person who is non potens in corpore, be retained and serve in the best manner he can, his master must pay him his wages.(*o*)

And a contract of hiring and service for wages would be considered beneficial and binding upon an infant, although it contains clauses for referring disputes to arbitration, and for the imposition of forfeitures in cases of neglect of duty, to be deducted from the wages.(*p*) But it has been held that a contract by an infant, binding himself to serve during a certain time for wages, but enabling the master to stop the work whenever he chose and retain the wages during the stoppage, is wholly void, as not being beneficial to the infant.(*q*)

Women and children, however, being considered to *require legislative protection and control whilst entering into contracts of hiring and service, various acts of parliament have, at different periods, [*8]

(*g*) Peters v. Fleming, 6 M. & W. 46; Wharton v. M'Kenzie, ubi supra.

(*h*) Hands v. Slaney, 8 T. R. 578.

(*i*) Rex v. St. Petrox, 4 T. R. 196; Rex v. Arundel, 5 M. & S. 257. In order to make it binding, however, he must execute the contract (as an adult must also. Rex v. Ripon, 9 East, 295.) It is not sufficient for the father and master to execute. Rex v. Cromford, 8 East, 25; Rex v. Arnesby, 3 B. & Ald. 584. But he may execute by the hand of a third party. Rex v. Langnor, 4 B. & Ad. 647.

(*k*) Rex v. Arnesby, 3 B. & Ald. 584. The reason why the father or friend generally joins in a contract of apprenticeship is, because an action of covenant will not lie against an infant apprentice for not serving. See Y. B. 21 H. 6, 31. Gilbert v. Fletcher, Cro. Car. 179; and see Capes v. Hutton, 2 Russ. 357. Though it appears to be otherwise by the custom of London. Horn v. Chandler, 1 Mod. 271; and see Ex parte Eden, 2 M. & S. 226; Com. Dig. tit. "Justices of the Peace," B. 55; Beard v. Webb, 2 B. & P. 99. Any action for breach of the contract on the part of the infant should be against the father, where he joins. Breach v. Ewington, 2 Doug. 518. To such an action it is no answer that it was the master's duty to compel service, Hughes v. Humphreys, 6 B. & C. 687, nor that the son avoided the indenture after he came of age, Cuming v. Hill, 3 B. & Ald. 59. See also Ellen v. Topp, 6 Exc. 424.

(*l*) Rex v. Chillesford, 4 B. & C. 94.

(*m*) Ibid. And see Wood v. Fenwick, 10 M. & W. 204. (*n*) Ibid.

(*o*) Dalt., Just. Ch. 58; Bro. tit. "Labour," 46; Bac. Ab. tit. "Master and Servant." And see Phillips v. Jones, 1 A. & E. 333.

(*p*) Wood v. Fenwick, 10 M. & W. 195. (*q*) Reg. v. Lord, 12 Q. B. 757.

been passed for this purpose, some of which are referred to in the note.(r)

LUNATICS.

The position of a lunatic, or person of unsound mind, is considered in general to bear some analogy to that of an infant in regard to his liability upon contracts.(s) For although, strictly speaking, a person of unsound mind is incompetent to contract,(t) yet there can be no doubt that a lunatic would be held liable to pay for any services which *had been* rendered to him, provided they were such as might reasonably be considered *necessary* for a person in his station in life. In such a case the law would imply a promise to pay for them.(u) And modern cases show, that where a party entering into a contract is a lunatic, but the state of his mind is unknown to the other party, who has taken no advantage of the lunatic, he would not be allowed to set up his lunacy as a defence to an action on the contract, especially in a case where the contract was not merely executory, but executed in the whole or in part, and the parties could not be restored altogether to their original position.(v)

[*9] *CORPORATIONS.

Contracts in general, in order to be binding upon a corporation, must be under the common seal of the corporate body.(w) This rule is to be found in all the authorities,(x) beginning with those collected from the Year Books in Brooks's Abridgment, tit. "Corporations and Capacities," down to the latest of the present day; the ground of the rule being, that as a corporation is a body politic, and invisible, it can only act and speak by its common seal; or as it is said arguendo, in Reg. v. Bigg,(y) "the common seal is the hand and mouth of the corporation."

Accordingly, no municipal corporation (except London(z)) can appoint an attorney except under the corporate seal.

(r) See as to Parish Apprentices, 56 Geo. 3, 139; 3 & 4 Wm. 4, c. 63. If in the sea service, 7 & 8 Vict. c. 112, s. 32; Apprentices to Watermen, &c. on the Thames, 7 & 8 Geo. 4, c. lxxv., s. 30; under the General Merchant Seamen's Act, 7 & 8 Vict. c. 112, s. 37; as to Chimney Sweeps, 3 & 4 Vict. c. 85 (see Rex v. Hipswell, 8 B. & C. 466;) as to Employment of Women and Children in Mines and Collieries, 5 & 6 Vict. c. 99; in Factories, 3 & 4 Wm. 4, c. 103; 7 & 8 Vict. c 15; 10 & 11 Vict. c. 29 (see Ryder v. Mills, 3 Exc. 853;) 13 & 14 Vict. c. 54; in Print Works, 8 & 9 Vict. c. 29; 10 & 11 Vict. c. 70.

(s) Wentworth v. Tubb, 1 Y. & C. N. C. 171.

(t) See Ch. on Contr. 129, et seq. The maxim of the Roman Law was "furiosus nullum negotium gerere potest, quia non intelligit quod agit," Inst. lib. 3, tit. 20, s. 8.

(u) See Baxter v. Earl of Portsmouth, 5 B. & C. 170.

(v) Molton v. Camroux, 2 Exc. 487. S. C. in Cam. Scacc. 4 Exc. 17.

(w) Bac. Abr. tit. "Corporations," E. 3; Com. Dig. tit. "Franchise," E. 13. In The Mayor of Ludlow v. Charlton, 6 M. & W. 815, it is shown that the doctrine is not, as it might appear, a mere relic of ignorant times. And see Diggle v. The London and Blackwall Railway Company, 5 Exc. 451.

(x) See Gibson v. East India Company, 5 Bing. N. C. 269.

(y) 3 P. Wms. 423.

(z) In London the appointment is matter of *record*. See The Mayor of Thetford's case, 1 Salk. 192; 3 Salk. 103; 2 Ld. Raym. 848; Holt. 171.

And, therefore, where (*a*) an attorney who was town clerk and clerk of the peace, received instructions from the mayor, and other members of the town council, to take all necessary steps to oppose certain measures in parliament, and to conduct certain suits in Chancery, relating to the borough, but no authority was given to him under the seal of the corporation; it was held, that he could not sustain an action against the corporation for his costs.

So where (*b*) a person, who, previously to the passing of the statute, 5 & 6 Wm. 4, c. 76, had held the offices of town clerk and clerk of the peace, and also clerk to the *justices, was, after the passing of that statute, re-appointed to the offices of town clerk and clerk of the [*10] peace at an increased salary, by a resolution passed at a meeting, and entered upon the minutes, of the town council: but there was no agreement under the seal of the corporation: It was held, upon issue joined on a return to a mandamus for compensation under 5 & 6 Wm. 4, c. 76, s. 66, bringing in question the fact of the re-appointment, that it could not be proved by an entry in the minutes of the town council, and, therefore, although there was no doubt that an agreement to the effect contended for had been made, yet that it could not bind the corporation without being sealed.

There are, however, two cases,(*c*) in which it was held that the solicitors employed in obtaining the acts of parliament incorporating certain companies had a legal claim against them when incorporated in respect to their services in obtaining the act of incorporation, although they were not, and from the nature of the case could not be, appointed under the seal of the corporate body. But in each of those cases there was a clause in the act directing that the costs of obtaining the act should be paid, in preference to all other claims, out of the first money received by the defendants; and those cases were decided on the ground that the meaning of the legislature was to make the incorporated companies, as soon as they had obtained funds, debtors to the solicitors who had obtained the acts for all the costs which they had incurred.(*d*) These cases do not, therefore, as at first might appear, form any exception to the general rule above stated.

There are, however, some exceptions to that rule, probably coeval with the rule itself, in those matters which, from their very nature or necessarily frequent occurrence, it would be difficult, or perhaps impossible, to execute with the formality of a seal. Those are matters of trifling importance and of frequent occurrence, such as the appointment of a servant, cook, or butler, or such as from their nature do not admit of delay, such as the appointment of a bailiff to distrain cattle damage feasant.(*e*)

(*a*) Arnold v. Mayor of Poole, 4 M. & G. 860. In Hall v. Mayor of Swansea, 5 Q. B. 544, Patterson, J., said, "The only difference I see between Arnold's case and that of a servant employed at smaller wages is the comparative inconvenience of insisting on a contract under seal in the latter case."

(*b*) Reg. v. Mayor of Stamford, 6 Q. B. 433.

(*c*) Tilson v. The Warwick Gas Light Company, 4 B. & C. 962, and Carden v. The General Cemetery Company, 5 Bing. N. C. 253.

(*d*) See Pardoe v. Price, 16 M. &. W. 460.

(*e*) Manby v. Long, 3 Lev. 107; Cary v. Matthews, 1 Salk. 191.

[*11] And it has been held, that a corporation *was liable to an action for an illegal distress, though not for damage feasant, by one who acted as their bailiff, although he was not appointed under seal.(*f*) And that a corporation might maintain an action of ejectment after a notice to quit given by a steward who was not appointed under seal.(*g*) But these exceptions do not apply to cases in which the contract vests an interest in, or divests an interest out of, a corporation. And therefore a corporation cannot, without deed, appoint a bailiff to seize goods as forfeited to the use of the corporation.(*h*)

The cases, in which it has been held that a cook or butler, or other inferior servant to a corporation, need not be appointed under the common seal, are said to rest on a fiction that some individual has been duly authorized to make contracts of that nature on behalf of the corporation.(*i*) And it has not yet been settled whether the exceptions introduced by them apply to the case of a corporation where no individual member is appointed head of the corporate body.(*k*) When, however, the case shall arise, there can, it is conceived, be little or no doubt that the further development of the principles, founded on expediency and convenience amounting almost to necessity, which have led, [*12] in England, *to the engrafting of exceptions on the ancient rule of the common law, and in America to its total abolition,(*l*) will lead to the conclusion, that the exceptions above mentioned apply equally to the case of all companies, whether with or without a head.

There is also another class of exceptions to the rule that corporations can only be bound by contracts under seal, which has arisen in modern times. Corporations have of late been established by royal charter, more frequently by act of parliament, for the purpose of carrying on trading speculations; and where the nature of their constitution has been such as to render the drawing of bills, or the constant making of any particu-

(*f*) Smith v. The Birmingham Gas Company, 1 A. & E. 526. In The Eastern Counties Railway Company v. Brown, 6 Exc. 314, it was held that a railway company might be liable to an action of trespass for assault and false imprisonment, in consequence of their servant having given a person into custody upon an unfounded charge, although the directions to the servant were not under seal. It does not appear in that case whether the *original appointment* of the servant was by deed, though most probably he was not so appointed, as he was only an inspector. It is clear, however, that a corporation may be *liable* in tort for the acts of their servants, although their authority be not under seal.(1) See ibid., and Roe v. The Birkenhead, Lancashire and Cheshire Junction Railway Company, 21 Law J., N. S. Exc. 9.

(*g*) Doe v. Pierce, 2 Campb. 96; and see Doe v. Bold, 11 Q. B. 127.

(*h*) Horn v. Ivy, 1 Mod. 18.

(*i*) See per Lord Cranworth, in Mayor of Ludlow v. Charlton, 6 M. &. W. 819, 821.

(*k*) Per Parke, B., in Cope v. Thames Haven Dock and Railway Company, 3 Exc. 844.

(*l*) See Story on Agency, sect. 53; 2 Kent's Comm. 288, 291 (part 4, lect. 33); and see Beverley v. Lincoln Gas Light and Coke Company, 6 A. & E. 837, where Patteson, J. says, "There are obvious circumstances which justify their advancing with a somewhat freer step to the discussion of ancient rules of our common law than would be proper for ourselves."

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(1) Chestnut Hill Co. v. Rutter, 4 S. & R. 16; Rathbone v. Tioga Nav. Co. 2 W. & S. 80.

lar sort of contracts, necessary for the purposes of the corporation, there the Courts have held that they would imply in those who are, according to the provision of the charter or act of parliament, carrying on the corporation concerns, an authority to do those acts without which the corporation could not subsist.(*m*)

Accordingly, in a variety of cases, corporations have been held bound by, and able to take advantage of, contracts necessarily incident to the purposes and objects for which the corporation was created, although such contracts have neither been under the corporate seal, nor entered into by an agent or servant authorized in that manner to act for the corporation. The exception established by these cases(*n*) depends upon the principle before adverted to of expediency and convenience amounting almost to necessity,—a principle, however, which although, in many cases, equally applicable to contracts of hiring and service as to contracts of *other descriptions, yet, it is conceived, would only apply to contracts for services of an ordinary description, and such as [*13] might be necessary for carrying on the business of the corporation.(*o*)

Contracts of this nature are in many cases regulated by the Joint Stock Companies' Act,(*p*) and the Companies' Clauses Consolidation Act, 1845,(*q*) which last applies to all joint stock companies incorporated by act of Parliament for the purpose of carrying on any undertaking, so far as the same are applicable thereto, except so far as expressly varied by the special act.

And it has recently been decided, that where the special act of parliament gave power to the directors of a company, to appoint servants and workmen, &c., without using the corporate seal, they could only exercise that power with regard to the appointment of *ordinary* servants; and, that it did not extend to enable them to enter into a contract for extraordinary services, which would be binding upon the company, without affixing the corporate seal.(*r*)

The question as to how far the directors of a railway company, had power under their special act to appoint servants, otherwise than by deed, was raised in the case of Cox v. The Midland Counties Railway Company,(*s*) and the Court in giving judgment,(*t*) intimated an opinion, that

(*m*) Per Lord Cranworth, in the Mayor of Ludlow v. Charlton, 6 M. & W. 821; and see Beverley v. Lincoln Gas Light and Coke Company, 6 A. & E. 829; Paine v. Strand Union, 8 Q. B. 326.

(*n*) Mr. Justice Story says truly, that this exception "affords a beautiful illustration of the expansive power of the common law, which acquires flexibility, and moulds itself from time to time so as to accomplish the various ends of modern society." Story on Agency, sect. 53.

(*o*) Dunston v. The Imperial Gas Light and Coke Company, 3 B. & Ad. 125. See Clark v. The same Company, 4 B. & Ad. 315, where it was held that the directors were justified in affixing the corporate seal to a deed granting a retiring pension to the plaintiff, who had been clerk to the company; and see Gibson v. East India Company, 5 Bing. N. C. 271; Beverley v. Lincoln Gas Company, 6 A. & E. 829; Church v. Imperial Gas Company, 6 A. & E. 853.

(*p*) 7 & 8 Vict. c. 110.

(*q*) 8 & 9 Vict. c. 16. See Homersham v. The Wolverhampton Water Works Company, 6 Exc. 137.

(*r*) Cope v. The Thames Haven Dock and Railway Company, 3 Exc. 841. See Diggle v. The London and Blackwall Railway Company, 5 Exc. 442.

(*s*) 3 Exc. 268. (*t*) P. 274.

under their act, they probably did possess the power, but it became unnecessary to *decide* the point on that occasion, as it was held, that assuming the servant in that case to have been properly appointed, yet, that he had not power to bind the company, by entering into the contract on which the action was brought.

[*14] *BANKRUPTS AND INSOLVENTS.

An uncertificated bankrupt or an insolvent, may himself maintain an action for the profits of his *personal* labour and skill, after his bankruptcy or insolvency, and his assigns have no right to interfere.(*u*) Indeed, in one case it was held, that he might even sue *them* where they had employed him to carry on the business.(*v*) And, where materials furnished, are necessary to the bankrupt's labour, the work and materials *may* become so blended together, as to form one joint cause of action upon which the bankrupt himself may sue, and be entitled to recover; his assignees not interfering.(*w*)

But a furniture broker who was employed in moving goods, in the course of which employment he procured vans, supplied packing cases, &c., and employed five or six men, and likewise cleaned and repaired furniture, was held not to be a man using merely his personal labour; and, therefore, that he could not recover the amount of his bill for so doing, if the assignees thought proper to put in their claim.(*x*)

And, where A. agreed to serve B. and C., who were typefounders, as their foreman for seven years, at fixed wages, at the rate of three guineas a week, "the party making default to pay to the other the sum of 500*l.*, by way or in the nature of specific damages:" A. was dismissed; then became bankrupt, and after the bankruptcy, brought an action upon the agreement for the amount of the penalty, to which the defendant pleaded his bankruptcy: it was held by the House of Lords, that the action could not be maintained, as the right of action *passed to his [*15] assignees,(*y*) on the ground that the contract contained a clause imposing a penalty for the breach thereof, *for which penalty* the action was substantially brought.(*z*)

Under the old Bankrupt Act,(*a*) it was held that a commission of bankrupt did not operate as a dissolution of a contract of a hiring between the bankrupt and his clerk, and the bankrupt was held liable to pay his clerk's wages, due from the expiration of the year last before the commis-

(*u*) Chippendall v. Tomlinson, 4 Doug. 318; S. C. 1 Co. Bank. Law, 432; Beckham v. Drake, 2 Ho. Lords Cases, 579, 643; Williams v. Chambers, 10 Q. B. 337; et cas. ib. cit. Ex parte Walters, 2 Mont. D. & De Gex, 635.

(*v*) Coles v. Barrow, 4 Taunt. 754; but see Nias v. Adamson, 3 B. & Ald. 232, where Best, J., said of Coles v. Barrow,—"If Mr. Justice Lawrence had continued in the Court of Common Pleas, that decision would probably not have been pronounced. It is not, therefore, entitled to any great weight. The authority of that case is much broken in upon by Hesse v. Stevenson," 3 B. & P. 578.

(*w*) Silk v. Osborne, 1 Esp. 140. (*x*) Crofton v. Poole, 1 B. & Ad. 568.

(*y*) Beckham v. Drake, 2 Ho. Lords Cases, 579.

(*z*) See per Maule, J., in Bell v. Carey, 8 C. B. 894. (*a*) 6 Geo. 4, c. 16.

sion, up to the time of rescinding the contract of hiring, notwithstanding the bankruptcy.(*b*)

CHAPTER II. [*16]

CONTRACT OF HIRING AND SERVICE.

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Firstly.—The Requisites of a Contract of Hiring and Service.

WHEN WRITING NECESSARY—STATUTE OF FRAUDS.(1)

By the common law, a servant might be hired either by deed or by a parol(*a*) contract, but when hired or retained by deed, could only be discharged by an equally formal instrument;(*bb*) when hired by parol, he might *also be discharged by parol.(*c*) Since the passing of the Statute of Frauds, however, it has become necessary in many [*17] cases, that contracts of hiring should be in writing.

By the fourth section of that statute,(*d*) it is enacted, "That no action shall be brought(*e*) upon any agreement that is not to be performed within the space of one year from the making thereof, unless the agreement upon which such action shall be brought, or some memorandum or note thereof shall be in writing, and signed by the party to be charged therewith, or some other person by him thereunto lawfully authorized."

In this enactment, the word "*performed*," means a complete, and not

(*b*) Thomas v. Williams, 1 A. & E. 685; see further on this point, post, ch. 4.

(*a*) A contract is called a "parol contract" when either verbal or in writing, but not under seal. See Beckham v. Drake, 9 M. & W. 79.

(*bb*) *i. e.*, from the *contract*, for he might be discharged from the *service*, so as to prevent his gaining a settlement by parol agreement; Pawlet v. Burnham, 1 Sess. Ca. 71; 2 Bott. 424.

(*c*) Dalt. Just. cap. 58; Reg. v. Daniel, 6 Mod. 182.

(*d*) 29 Car. 2, c. 3. The corresponding Irish act is 7 Wm. 3, c. 12.

(*e*) The case of Carrington v. Roots, 2 M. & W. 248, decided that not only can no action be brought upon an agreement within this section, if it be not reduced into writing, but that the contract is, for all purposes, void. See Reade v. Lamb, 2 L. M. & P. 67, 69.

(1) See 1 Greenl. on Evid. § 262, et seq. for cases and authorities.

a mere inchoate or partial performance; and, therefore, where an agreement distinctly shews upon the face of it, that the parties contemplated its performance to extend over a greater space of time than one year, it is within the statute; but, where the contract is such that the whole may be performed within a year, and there is no stipulation to the contrary, the statute does not apply.(*f*)

Accordingly, where(*g*) the defendant *verbally* agreed, on the 27th of May, to take the plaintiff into his service as groom and gardener, for a year, to commence on the 30th of June following, but afterwards refused to receive him; it was held that the plaintiff could not sustain any action for such breach of contract as there was no written agreement; Lord Ellenborough, C. J., saying, "if we were to hold that a case which extended one minute beyond the time pointed out by the statute did not fall within its prohibition, I do not see where we should stop; for, in [*18] point of reason, an excess of twenty years will equally not be within the act."

So where(*h*) the defendant, on the 20th of July, proposed to hire the plaintiff as bailiff for one year, to commence on the 24th of July; and the defendant at that time wrote a memorandum, (but which was signed by neither of the parties,) which was delivered to the plaintiff, and by him taken away, stating the terms on which the plaintiff was to serve; and the plaintiff entered the defendant's service on the 24th, but before the expiration of the year the defendant, being displeased with the plaintiff, gave him a month's warning to quit his service; and the plaintiff left before the expiration of the year: It was held, that he could not maintain an action against the defendant for not continuing the plaintiff for the year, as there was no agreement in writing, in conformity with the Statute of Frauds.

And where(*i*) the plaintiff entered into the service of the defendant under the following agreement:—"I agree to receive you as clerk or bookkeeper in my establishment, in consideration of your paying me a premium of 300*l.*, and to pay you a salary *at the following rates*, viz.: for the first year 70*l.*; for the second 90*l.*; for the third 110*l.*; for the fourth 130*l.*; and 150*l.* for the fifth and following years that you may remain in my employment; and I also agree in case of the death of either of us to return 150*l.*:" It was held, that the agreement was one that by the Statute of Frauds was required to be in writing; and that, there being a precise stipulation for yearly payments, evidence was not admissible to shew a verbal agreement for quarterly payments.

The mere circumstance that a contract is defeasible, and may be put an end to within the year, does not take it out of the operation of the Statute of Frauds, if by its terms it is to continue for more than a year in case

(*f*) Per Tindal, C. J.; Souch v. Strawbridge, 2 C. B. 815; Boydell v. Drummond, 11 East, 142. The cases on this subject will be found collected in 1 Smith's L. C., note to Peter v. Compton; and see Cherry v. Heming, 4 Exc. 631; S. C. 19 Law J., N. S., Exc. 63.

(*g*) Bracegirdle v. Heald, 1 B. & Ald. 722.

(*h*) Snelling v. Lord Huntingfield, 1 C. M. & R. 20.

(*i*) Giraud v. Richmond, 2 C. B. 835.

it is not put an end to.(*k*) But a contract to serve for an indefinite period, subject to be put an end to at any time, upon a reasonable notice, is not within the statute, though it may extend beyond the year.(*l*) A contingency *is not within the statute, nor any case that depends upon a contingency.(*m*) The words of the statute, "not to be [*19] performed," mean, not to be performed on one side or the other.(*n*) Where, therefore, the contract has been *completely* performed on one side, the statute does not apply.(*o*) This position, however, is not quite beyond dispute.(*p*) It seems clear, however, that the consideration, when entire, cannot be split: where, therefore, any part of it is not executed, the statute has been held to apply.(*q*)

But the statute does not apply where an agreement for a yearly hiring is merely implied from circumstances.(*r*) And it would seem to be the better opinion that it does not apply where the agreement is by deed,(*s*) as the object of the statute would be satisfied when the terms of the agreement were reduced into writing and authenticated by a seal or mark. Nor does the statute, or the decisions upon it, affect the question of what is sufficient hiring to confer a settlement by service under it.(*t*) And the absence of an agreement in compliance *with the Statute of Frauds would not defeat an action for wages in [*20] respect of services actually performed; though the amount which a plaintiff in such cases could recover would depend upon what his services were worth irrespectively of any agreement.

And in the case of a dispute between master and servant within the meaning of the statute 4 Geo. 4, c. 34, the absence of a contract in writing, would not take the case out of the jurisdiction of a magistrate where the service had been entered into.(*u*)

Where an agreement in writing is necessary under the terms of the Statute of Frauds, it is not necessary that there should be a formal agreement signed by the party to be charged; any acknowledgment in

(*k*) Birch v. Earl of Liverpool, 9 B. & C. 392; and see Roberts v. Tucker, 3 Exc. 632.

(*l*) Per Tindal, C. J., in Souch v. Strawbridge, 2 C. B. 815.

(*m*) Per Denison, J., in Fenton v. Emblers, 3 Burr. 1278.

(*n*) Donellan v. Read, 3 B. & Ad. 899.

(*o*) Cherry v. Heming, 4 Exc. 631; 19 Law J., N. S., Exc. 63, S. C.; and see Souch v. Strawbridge, ubi supra.

(*p*) 1 Byth. Conv. (3rd ed.) 310, 311; 1 Smith's L. C. 143, note to Peter v. Compton; and see Taylor on Evid. 757; the judgment of Tindal, C. J., in Cocking v. Ward, 1 C. B. 868; and the judgment of Coltman, J., in Souch v. Strawbridge, 2 C. B. 816. It is to be observed, that in Cocking v. Ward the surrender by the plaintiff, which formed part of the consideration for the defendant's promise, had not been made in *writing*, and therefore the consideration was not *entirely* executed. A similar observation applies to Buttermere v. Hayes, 5 M. & W. 546, (see the observations and judgment of Parke, B., pp. 458, 459,) which Tindal, C. J., is reported (1 C. B. 868) to have cited as an authority "that the contract, though executed on the part of the plaintiff, yet not being executed on the part of the defendant also, is still to be considered as a contract within the Statute of Frauds."

(*q*) Cocking v. Ward, 1 C. B. 858.

(*r*) Beeston v. Collyer, 4 Bing. 309.

(*s*) Cherry v. Heming, 4 Exc. 631; S. C. 19 Law J., N. S., Exc. 63; Cooch v Goodman, 2 Q. B. 580.

(*t*) See per Bayley, J., in Bracegirdle v. Heald, 1 B. & Ald. 722; but see Carrington v. Roots, 2 M. & W. 248; Reade v. Lambe, 2 L. M. & P. 69, ante, p. 17, note(*e*)

(*u*) See sect. 3, and Reg. v. Lord, 12 Q. B. 762.

writing that he had entered into such an agreement would be a sufficient memorandum within the statute,(*v*) if made *before* action brought. An acknowledgment made *afterwards* would not do.(*w*) But it has been held, that the mere nomination to the bishop of the diocese of the plaintiff, as the defendant's curate, is not a sufficient acknowledgment.(*x*)

And it matters not from how many different papers the agreement be collected, provided they are connected in sense;(*y*) for the writing is merely evidence of the contract which is made before any signature thereof by the parties.(*z*)

The statute enacts that "the agreement, or some memorandum or note thereof," shall be in writing, &c. This word "agreement" includes the consideration upon which the agreement of the party to be charged is founded as well as his promise.(*a*)(1)

[*21] In every written contract of hiring and service, therefore, *the consideration must appear either expressly, or by necessary implication, or the contract cannot be enforced.(*b*) Thus, where(*c*) the defendant signed the following agreement,—"I hereby agree to remain with L. for two years from the date hereof, for the purpose of learning the business of a dressmaker,"—it was held, that L. could not maintain an action against the defendant for leaving her service before the expiration of the two years, as the agreement did not shew any obligation on L. to teach the defendant, and was, therefore, void for want of mutuality.

And where(*d*) B. signed an agreement to "work for and with S., manufacturer of powder flasks and other articles, at and in such work as he shall order and direct, and no other person whatsoever, from this day henceforth during and until the expiration of twelve months; and so on from twelve months' end until twelve months' end, until I shall give the said L. twelve months' notice in writing, that I shall quit his service;" the agreement was held void for want of mutuality, as S. was not bound to employ B.; and, therefore, that S. could not maintain an action against the defendant for harbouring B.

(*v*) Roberts v. Tucker, 3 Exc. 632, 641; Longfellow v. Williams, Peake's Add. Cas. 225.

(*w*) Bill v. Bament, 9, M. & W. 36. (*x*) Roberts v. Tucker, ubi supra.

(*y*) Boydell v. Drummond, 11 East, 152; 1 Smith's L. C. note to Birkmyr v. Darnell; see per Maule, J., in Weedon v. Woodbridge, 13 Q. B. 475.

(*z*) Laythoarp v. Bryant, 2 Bing. N. C. 744.

(*a*) The cases are all collected in 1 Smith's L. C. 133, note to Birkmyr v. Darnell; see Wain v. Warlters, 5 East 10, and Saunders v. Wakefield, 4 B. & A. 596, which are usually cited in support of this proposition. The point, however, was, in effect decided previously in Rann v. Hughes, 7 T. R. 350; but that case, curiously enough, was not even cited in Wain v. Warlters,(2) or Saunders v. Wakefield, nor is it noticed in Smith's note to Birkmyr v. Darnell. See 1 Wms. Saund. 211; and see Puff. lib. 5, cap. 2, § 2; Grot. lib. 2, cap. 11, § 4.

(*b*) 1 Wms. Saund. 211, note (*d*).

(*c*) Lees v. Whitcomb, 5 Bing. 34; and see Sweet v. Lee, 3 M. & G. 466.

(*d*) Sykes v. Dixon, 9 A. & E. 693.

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(1) See Judge Hare's note to Birkmyr v. Darnell, 1 S. L. C. 134, Amer. Ed. p. 273, 3rd. ed.

(2) See Judge Hare's note to this case in 2 S. L. C. p. 243, 3 ed. Johnson's Law Library—1847.

But where(*e*) the plaintiffs agreed in writing with S. that he would, at all times during the term of seven years, serve them as a crown glass maker, that he would not, during the said term, work for any other person at any other glass house or place of business without the license of the plaintiffs; that it should be lawful for the plaintiffs to deduct from his wages any fine that he might incur for breach of their rules; that during any depression of trade he should be paid a moiety of his wages; that if he should be sick or lame the plaintiffs should be at liberty to employ any other person in his stead, without paying him any wages; that the plaintiffs should pay him when and so long as he should be continued to be employed and work as a crown glass maker, *wages by the piece (stating them) and 8*l.* per annum in lieu of house rent [*22] and firing; and that the plaintiffs should have the option of dismissing him from their service, or giving him a month's wages or a month's notice: It was held, that looking at the agreement altogether, it sufficiently appeared that the plaintiffs were bound to employ L. for the seven years, subject to the notice, and that L. was bound to serve them for that period, on the same terms; and, therefore, that the contract was binding on the parties, and might be made the foundation of an action against the defendants for harbouring and employing the plaintiffs' servant.

And so where(*f*) P. contracted to serve the plaintiff and his partners for the time being, for seven years, in the business of a glass and alkali manufacturer, and at all times during the term to do his best endeavours and use his utmost care and diligence in the works; and further, that he would not, at any time during the term, neglect or absent himself from the said service without the consent, in writing, of the plaintiff or his partners for the time being, or either or such of them as should carry on the business, nor would work for or serve any other person without such consent; in consideration of which service the plaintiff agreed to pay P. twenty-four shillings per week for a certain amount of work, and to find him some other description of work provided he should not require that quantity of the specified work, so that P's wages should not be less than twenty-four shillings per week, except when a furnace should be out, when P. agreed to work for twenty-one shillings per week, and it was agreed that if P. should be sick or incapacitated from performing the service, or in case of misconduct, or if the plaintiff or his partners for the time being, or either or such of them as should carry on the trade, should discontinue the trade during the term—in either of such cases the plaintiff or his partners should be at liberty to retain or employ any other person in the room or stead of P., without being obliged to pay him any wages or satisfaction: It was held, that there was no want of mutuality in the contract, and that the plaintiffs were bound to employ P., and might maintain an action against the defendant for seducing P. from their service, and harbouring him after notice.

*If, however, there sufficiently appears to have been a [*23]

(*e*) Pilkington v. Scott, 15 M. & W. 657.

(*f*) Hartley v. Cummings, 5 C. B. 247; and see Williamson v. Taylor, 5 Q. B. 175, post, p. 48.

consideration, the Courts will not inquire into the *adequacy* of it—for that were, in truth, to inquire whether the parties have or have not made a good bargain, which must be left to the parties themselves to settle.(*g*) But if the consideration appear to be illegal,(*h*) either on the ground of fraud or immorality, or as being contrary to public policy, or the enactments of any statute, the whole agreement will be vitiated, and cannot be made the foundation of any action.(*i*)

Thus, a contract for service and cohabitation would be void, and could not be enforced in a Court of law, and parol evidence would be admissible to shew whether the consideration for the hiring was wholly or in part cohabitation.(*k*)

And where a contract is made on several considerations, any one of which is illegal, the whole contract is void.(*l*) If, however, the consideration be good, and *the contract be partly good and partly [*24] bad, and that part which is good, can be separated from that which is bad, the good part may be sustained, provided the declaration be framed so as to meet the proof of that part of the contract which is good.(*m*) A distinction, however, has been taken as to what is illegal, at common law, and what is made illegal by particular statutes, and it has been said that the latter would vitiate the whole instrument, the former only that part which is illegal.(*n*) But whether the whole is vitiated or not, must depend in great measure on the enactments of the particular statute.

A contract of hiring and service for a year made on a Sunday, between a farmer and a labourer is valid, notwithstanding the statute 29 Car. 2, c. 7, s. 5, which enacts, that no tradesman, artificer, workman, labourer, or any person whatsoever, shall do or exercise any worldly labour, business or work of their ordinary calling on the Lord's Day.(*o*)

Where the agreement is one, which by the Statute of Frauds, is re-

(*g*) Hitchcock v. Coker, 6 A. & E. 438; Archer v. Marsh, 6 A. & E. 659; Pilkington v. Scott, 15 M. & W. 657; Hartley v. Cummings, 5 C. B. 247; Sainter v. Ferguson, 7 C. B. 716.

(*h*) In Paxton v. Popham, 9 East, 421, Lord Ellenborough said, "Since the case of Pole v. Harrobin in 1782, it has been generally understood, that an obligor is not tied up from pleading any matter which shews that the bond was given upon an illegal consideration, whether consistent or not with the condition of the bond." And see Josephs v. Pebrer, 3 B. & C. 639; Cope v. Rowlands, 2 M. & W. 157.

(*i*) Parol evidence to shew that the consideration is illegal, if such be the case, is held to be admissible on the grounds of public policy, and not for the sake of the defendant, but because courts of law will not lend their aid to a plaintiff who seeks to enforce an illegal or immoral contract. See Collins v. Blantern, 2 Wils. 350; 1 Smith's L. C. 169; Holman v. Johnson, Cowp. 341; Ch. on Contr. 570; Abbott v. Hendricks, 1 M. & G. 791; Gas Light and Coke Company v. Turner, 6 Bing. N. C. 327.

(*k*) Rex v. Northingfield, 1 B. & Ald. 912. This was a case of settlement, it is true, and not between the parties to the contract, but it illustrates the rule above given. See Bradshaw v. Hayward, Carr. & M. 591, where the defendant was allowed to prove an agreement for co-habitation without pleading it, in answer to an action for wages.

(*l*) Jones v. Waite, 1 Bing. N. C. 656; S. C. in Cam. Scacc., 5 Bing. N. C. 341; S. C. in Dom. Proc., 9 Cl. & Fin. 101; Shackell v. Rosier, 2 Bing. N. C. 634; and see Hopkins v. Prescott, 4 C. B. 578; Nicholls v. Stretton, 10 Q. B. 346.

(*m*) Co. Litt. 206 b, note; Wood v. Benson, 2 Cr. & J. 95; and see Price v. Green, 16 M. & W. 346; Nicholls v. Stretton, 10 Q. B. 346.

(*n*) Per Bayley, J., in Wood v. Benson, 2 Cr. & J. 95; Chater v. Beckett, 7 T. R. 201; Thomas v. Williams, 10 B. C. 664; and see 1 Wms. Saund. 66, note to Butler v. Wigge.

(*o*) Rex v. Whitnash, 7 B. & C. 596.

quired to be in writing, it must also "be signed by the party to be charged therewith, or some other person by him thereunto lawfully authorised." It is not, however, necessary to prove an agreement signed by *both* parties. It is sufficient if signed by the *party to be* charged.(*p*) And this is enough, although it conclude, "as witness our hands."(*q*) Mere initials, however, are not sufficient.(*r*) Signature at the commencement is good, as "I, A. B. agree."(*s*) But, if in such a case the agreement conclude, "as witness our hands," it should be signed by the party to be charged at the *end.(*t*) And if not signed at the end, it is a question for the jury, if the party meant to be bound by it.(*u*) In any case, the writing must, of course, be signed before action brought.(*v*)(1) [*25]

If the agreement be signed by an agent, it will be sufficient if he were *lawfully* authorized, it is not necessary that he should be authorized *in writing*.(*w*) A subsequent adoption of the act of the agent is equivalent to a previous authority, and is sufficient to satisfy the requirements of the statute.(*x*) And in one case,(*y*) it was held that a subsequent adoption of another person's act was sufficient, although he did not at the time he acted, assume to act as agent.

THE STAMP.

The schedule to the general Stamp Act,(*z*) which imposes a duty upon agreements, &c., contains exemptions in favour of any—

"Memorandum or agreement for the hire of any labourer, artificer, manufacturer, or menial servants:" and also any

"Memorandum or agreement made between the master and mariners of any ship or vessel for wages, on any voyage coastwise from port to port in Great Britain."(*a*)

In order that an agreement may come within the Stamp Act, and require a stamp, it must be such an agreement as would be evidence against *both* the contracting parties. And, therefore, where(*b*) the de-

(*p*) Laythoarp v. Bryant, 2 Bing. N. C. 735; and see 3 M. & G. 462, note.
(*q*) Norton v. Powell, 4 M. & G. 42. (*r*) Sweet v. Lee, 3 M. & G. 452.
(*s*) Knight v. Crockford, 1 Esp. 190; and see Lobb v. Stanley, 5 Q. B. 574, a note, commencing with the defendant's name.
(*t*) Hubert v. Treherne, 3 M. & G. 743.
(*u*) Johnson v. Dodgson, 2 M. & W. 653. As to the absence of any date, see Symmons v. Want, 2 Stark. 371. (*v*) Bill v. Bament, 9 M. & W. 36.
(*w*) 1 Smith's L. C. 322, note to Whitcomb v. Whiting. Sect. 3 of the Statute of Frauds requires that an agent under that section should be authorised in writing, and in that point differs from sect. 4. See Blogg v. Kent, 6 Bing. 614.
(*x*) Maclean v. Dunn, 4 Bing. 722.
(*y*) Kinnitz v. Surrey, Paley on Ag. 171, note, quoted in Maclean v. Dunn. See, however, Wilson v. Tumman, 6 M. & G. 236, and post.
(*z*) 35 Geo. 3, c. 184. See now 7 & 8 Vict. c. 81; 13 & 14 Vict. c. 97, as to the stamp on agreements.
(*a*) Agreements between masters and mariners in the merchant service are exempt from duty. See 7 & 8 Vict. c. 112; 13 & 14 Vict. c. 93, ss. 22, 46.
(*b*) Vaughton v. Brine, 1 M. & G. 359; and see Beeching v. Westbrook, 8 M. &

(1) See notes ante, p. 20–21.

[*26] fendants *being the provisional committee of an incorporated association, signed a resolution, whereby they acknowledged the past services of the plaintiff "in canvassing for, negotiating and generally assisting in the preliminary business of, and connected with the said association, and, in consideration of such past services, do hereby for ourselves jointly and severally undertake and agree to appoint the said V. (the plaintiff,) to the office of secretary of the said association, to be held by him so long as we shall be in the direction and control of the said association, at a minimum salary of 250*l.* per annum, from this date, and we do hereby jointly and severally, especially undertake and agree, not to part with or relinquish the management of the said association, without first securing to the said V. a confirmation of the said appointment:" it was held, that it did not require a stamp.

The exemptions in the Stamp Act have been held(*c*) only to apply to the case of hiring, and not to the case of apprenticeship, or to an agreement for the hire of a clerk.(*d*) And in a recent case,(*e*) it was held, that "firemen and stokers" on board a steamer came within the above exemption as labourers and artificers, and were not to be considered as mariners, under 7 & 8 Vict. c. 112,(*f*) Coleridge, J., saying, "It appears from the contract that they undertake to do the work and discharge the duty of firemen and stokers, and to obey the orders of the engineer. Now, it is quite certain if this were the case of a locomotive engine belonging to a railway company, and these persons had agreed to do the same in connection with it, they might well be called labourers, if not artificers. So in this case I do not think they made themselves ordinary seamen, but that they engaged for the particular duty of doing the work of firemen or stokers, subject to the order of the engineer, and, therefore, are fairly within the exemption in the Stamp Act."

[*27] **Secondly.—Interpretation of the Contract.*

ADMISSIBILITY OF PAROL EVIDENCE.(1)

Where the agreement is such that it is required by the Statute of Frauds to be in writing, parol evidence is not admissible to show *verbal* alterations of it, for that would be a direct violation of the statute.(*g*) And the law is the same where the agreement is reduced to writing, whether it be such an agreement as calls for a memorandum or not.(*h*)

W. 411; Knight v. Barber, 16 M. & W. 66; Vollans v. Fletcher, 1 Exc. 20; Marshall v. Powell, 9 Q. B. 779.

(*c*) Rex v. St. Paul, Bedford, 6 T. R. 452. (*d*) 2 Cr. & Dix. Cir. Rep. (Irish,) 225.

(*e*) Wilson v. Zulueta, 19 Law J., N. S., Q. B. 49; and see Reg. v. Wortley, 21 Law J., N. S., M. C. 44, post, p. 34, where W. was held to be a labourer within the meaning of the exemption in the Stamp Act. (*f*) See 13 & 14 Vict. c. 93, ss. 22, 46.

(*g*) Goss v. Lord Nugent, 5 B. & Ad. 58; Stowell v. Robinson, 3 Bing. N. C. 928; Stead v. Dawber, 10 A. & E. 57.

(*h*) Countess of Rutland's case, 5 Rep. 25; and see Lockett v. Nickling, 2 Exc. 93, 97. But this would not apply to a memorandum made by a third party of the terms

(1) Greenl. on Evid., ch. 15, § 275.

And "it seems to be unnecessary to inquire what are the *essential* parts of the contract and what not, and that *every* part of the contract in regard to which the parties are stipulating must be taken to be material."(*i*) Thus, where(*k*) a written agreement of hiring and service contained stipulations for *yearly* payments, evidence that a verbal agreement for *quarterly* payments had been made, was rejected,—and the fact of quarterly payments having been made, was held not to vary the rights of the parties.

But although where parties agree that a particular instrument shall contain the terms of the contract, parol evidence cannot be given to add to or diminish those terms, yet it may be given to *annex incidents*, as it is termed.(*l*)

Thus, where(*m*) the plaintiff entered into the defendant's service under a written agreement, "that he was to have six shillings a week, three bolls of wheat, to set potatoes for his family's use, to have a cow kept, house and firing, and to keep himself a pig,—no poultry to be *kept; his wife to keep the museum clean; he was to keep the [*28] gardens and pleasure grounds in clean and good order, to assist in the stables, and, when required, at hay and corn harvest, and to make himself generally useful; to enter on the 12th of May, 1838:"—Evidence was admitted to shew that the plaintiff was, by custom, only entitled to a month's warning.

And in a settlement case,(*n*) where a pauper signed the following agreement:—"Plate and dish-workers. This day agreed with B. to serve Messrs. B. from the 11th day of November next, until the 11th of November, 1817, at prices good out of oven as per opposite side. We agree to lose no time on our own account, to do our work well, and behave ourselves in every respect as good servants. Witness our hands, the 10th day of January, 1815:"—Evidence was held admissible to shew that an universal custom prevailed amongst china manufacturers to allow holidays at certain fixed times of the year to the platers and dishers, and that at those times the latter could, notwithstanding the above agreement, absent themselves from their work without their masters' permission.

Again, in(*o*) an action for wrongfully dismissing the editor of a news-

of the hiring, as to exclude parol evidence of those terms. Rex v. Wrangle, 2 A. & E. 514.

(*i*) Per Parke, B., in Marshall v. Lynn, 6 M. & W. 117.

(*k*) Giraud v. Richmond, 2 C. B. 835.

(*l*) Hutton v. Warren, 1 M. & W. 475. See the cases collected in 1 Smith's L. C. 305, et seq.; and see also Spartali v. Benecke, 19 Law J., N. S., C. P. 293; Lockett v. Nicklin, 2 Exc. 93; Syers v. Jonas, 2 Exc. 111.

(*m*) Johnson v. Blenkensopp, Trin. T. 1841, 5 Jurist, 870.

(*n*) Reg. v. Stoke upon Trent, 5 Q. B. 303. Observe, however, that in that case the dispute was between two parishes who were no parties to the agreement, and the question was whether the pauper had gained a settlement by hiring and service. In such cases parol evidence is always admissible to ascertain independent facts collateral to the written agreement. See Rex v. Laindon, 8 T. R. 379; Rex v. Northwingfield, 1 B. & Ad. 912; Rex v. Billinghay, 5 A. & E. 676; and cas. ib. cit. See also 2 Ph. Ev. 355.

(*o*) Holeroft v. Barber, 1 C. & K. 4; and see Baxter v. Nurse, 1 C. & K. 13, where Tindal, C. J., in summing up to the jury, said, "There is no doubt that where there is

paper who had been engaged by letter, evidence was admitted to prove a custom, that editors, sub-editors, and reporters of newspapers, were always engaged for a year, unless it were otherwise expressed at the time of making an engagement.

Upon similar principles, parol evidence is also held to be admissible, [*29] to explain the meaning of terms used, *where an ambiguity is raised by evidence as to the meaning of those terms.(*p*)

Thus where,(*q*) by a written contract, the plaintiff agreed to perform at the defendant's theatre, and the defendant engaged her *for three years* and engaged to pay her a salary of 5*l.* 6*l.* and 7*l.* per week, in those years, parol evidence was admitted to shew that, according to the understanding and custom of the theatrical profession, under an engagement to perform for one or more *years*, actors were only paid during the theatrical *season*.

THE RELATIONSHIP CREATED BY THE CONTRACT: PARTNER OR SERVANT.

Arrangements are frequently made between masters in trade and brokers, clerks, travellers, and other agents and servants employed by them, under which such persons, in lieu of receiving a fixed salary, are remunerated by a portion of the sums received by them on account of their master, or by a per centage on their earnings, or by a sum calculated with reference to the gross or net profits(*r*) of their master or principal, or some part of such profits; or in some similar method. These various modes of payment, which are generally adopted with a view to secure or increase exertion, often give rise to a question of considerable importance; viz., how far the persons whose services are to be so remunerated, are to be regarded as partners, and not mere servants or agents in the business.

The first cases in which the question arose, were cases in which objection was made to the admissibility of factors and brokers, whose remuneration was to be calculated in that way, as witnesses, on the ground of [* 30] interest. Such persons, however, were held not to be *disqualified on that ground,(*s*) as they would have been had they been considered partners.

The exact point decided in these cases, is not likely to arise again, all objection to the admissibility of a witness, on the score of interest, having been removed by the legislature.(*t*) But the question whether an agreement of the description before referred, to, renders the person, whose services are to be remunerated in the manner above pointed out, a part-

a general understanding, and a course of dealing and agreements are made, without any specific stipulations to vary them from such general course of dealing, they are included in it."

(*p*) Sotilichos v. Kemp, 3 Exc. 105; Smith v. Thompson, 8 C. B. 44, 59.

(*q*) Grant v. Maddox, 15 M. & W. 737; and see Smith v. Thompson, 8 C. B. 44, where it was held to have been properly left to a jury to say whether the plaintiff (a clerk) had been guilty of a misappropriation of money entrusted to him by the defendant, his master, "*for business purposes*," in having applied part of it to the payment of his own salary.

(*r*) As to the meaning of the term "net proceeds," see Caine v. Horsefall, 2 Carr. & K. 349.

(*s*) Dixon v. Cooper, 3 Wils. 40; Benjamin v. Porteus, 2 H. Bl. 590.

(*t*) See stat. 3 & 4 Wm. 4, c. 42, s. 26; 6 & 7 Vict. c. 85.

ner or a servant, still often arises. Those cases are therefore, important, and are frequently referred to, at the present day, as authorities upon that subject.

Where, indeed, the question arises *between the parties themselves*, the mere fact, that the servant was to be remunerated by a portion of the profits, will not alone constitute him a partner,(*u*) if it appear, from the whole scope of the agreement entered into, that the intention of the parties was to create the relationship of master and servant, and not that of partners.

Thus,(*v*) where A., having neither money nor credit, offered the plaintiff that if he would order with him certain goods to be shipped as an adventure, if any profit should arise from them, the plaintiff should have one-half for his trouble. The plaintiff ordered the goods on their joint account, and paid for them, and A. having died, without coming to a settlement, the plaintiff was held entitled to recover the amount from A.'s executors. And Lord Ellenborough said, "The distinction taken in Waugh v. Carver,(*w*) applies to this case. *Quoad* *third persons, it was a partnership; for the plaintiff was to share half the profits. But [* 31] as between themselves it was only an agreement for so much as a compensation for the plaintiff's trouble; and for lending A. his credit."(1)

And an agreement to divide the *produce* of a whaling voyage between the captain, officers and seamen, in certain proportions, has been held not to constitute them partners, so as to preclude one of the seamen from recovering his wages in an action against the captain.(*x*)

And so(*y*) the manager of a glass work company enjoying an annual stipend, and also by way of further remuneration, a share of the profits calculated according to a proportion of capital and stock, not advanced by him, but assigned by way of nominal interest, was held not to be a partner as between himself and the members of the company.

But where(*z*) A. a merchant and insurance broker, agreed to pay B. a certain salary for superintending his mercantile concerns, and also agreed "to allow Mr. B. one-half of the profit arising from my account of insurances, from the commencement of the said account until the present period, or those that may hereafter be done;" the parties having acted

(*u*) In Peacock v. Peacock, 2 Camp. 45, Lord Ellenborough observed, "A man who renders himself liable to third persons as a partner may, in truth, be the mere agent or servant of his supposed copartners, and entitled only to fixed wages."

(*v*) Hesketh v. Blanchard, 4 East, 144.

(*w*) 2 H. Bl. 335; S. C. 1 Smith's L. C. 491. In that case, A. and B., ship agents at different ports, entered into an agreement to share in certain proportions the profits of their respective commissions, and the discount on tradesmen's bills employed by them in repairing the ships consigned to them, &c. And it was held, that they were liable as partners to all persons with whom either contracted as such agents, though the agreement provided that neither should be answerable for the acts or losses of the other, but each for his own. Eyre, C. J., observing, that it was plain, upon the construction of the agreement between the parties themselves, that they were not, nor ever meant to be partners; yet that they had made themselves such with regard to their transactions with the rest of the world.

(*x*) Wilkinson v. Frasier, 4 Esp. 182; and see Mair v. Glennie, 4 M. & S. 240; Stocker v. Brocklebank, 20 Law. J. N. S., Ch. C. 401.

(*y*) Geddes v. Wallace, 2 Bligh, 270.

(*z*) Knowles v. Haughton, Lib. Reg. 1804 A., 1008, cited in Collyer on Partnership, 17.

(1) See Judge Hare's note to this case 1 Sm. L. C. 730, 3 ed. Johnson's Law Library.

on this agreement, were held to be partners in the insurance business. And where(*a*) the plaintiff agreed with the defendant to convey by horse and cart, the mail between Northampton and Brackley, at 9*l.* a mile per annum, and to pay his proportion of the expense of the cart, &c.; money received for the carriage of parcels to be divided between them, and the damage occasioned by loss of parcels, &c., to be borne in equal proportions: It was held that this agreement constituted a partnership, and [* 32] *not a mere measure of wages, and consequently that the plaintiff could not sue the defendant for the 9*l.* a mile.

However, in the following case,(*b*) the parties were held not to be partners. C. sold to R., and conveyed to him by deed his interest in the profession and practice of a surgeon, &c., carried on by him in P. Street, for 900*l.*—500*l.* to be paid on the execution of the deed, and 400*l.* at the end of a year. C. covenanted not to practice within three miles of P. Street; and also, that during one year from the date of the deed, he would reside in P. Street, and carry on the profession as before, and introduce R. to the patients, and promote the interest of the concern. In consideration thereof, R. covenanted to allow C. during the year, a moiety of the clear profits of the concern, to be paid at the expiration of the year. In an action of covenant brought by C. upon the deed, R. claimed to set off certain sums received by C. during the year from patients, as money had and received to *his* use. Pollock, C. B., before whom the action was tried, refused to admit evidence of the receipt by C. of these sums, on the ground that the parties were partners during the first year. Upon which a bill of exceptions was tendered, and the Exchequer Chamber awarded a venire de novo, considering the parties were *not partners*, and that the evidence ought to have been admitted.

So, where(*c*) S. being entitled to certain letters-patent, for making lucifer match-boxes, for a money consideration, granted an exclusive license to B. and Co. for the whole term, and by deed covenanted to serve B. and Co., as manager of the business for the same period, with power to B. and Co., in case of the bankruptcy or insolvency of S., or breach of the covenants on his part, to determine the engagement by notice in writing. B. and Co. covenanted with S., that they would diligently employ themselves in the business, and that S. should have the management thereof under their directions; that if S. should have duly observed the covenants, B. and Co. would pay him a gross sum of money at the expiration of the license; and further, by way of salary, such a sum of money every quarter-day, as should be equal to 40*l.* per cent. of the net proceeds of the business, and in case of S.'s death before, would pay his executors during [* 33] *the remainder of the term, 30*l.* per cent. upon the net profits; and, it was provided, that in case B. and Co. discontinued the business, S. should have the option of purchasing their interest in the license, and the stock, &c., but that nothing therein contained should constitute S. a partner. After the business had been carried on for a time under this arrangement, B. and Co. discharged S. from being manager,

(*a*) Green v. Beesley, 2 Bing. N. C. 108; and see Bond v. Pittard, 3 M. & W. 357.
(*b*) Rawlinson v. Clarke, 15 M. & W. 292.
(*c*) Stocker v. Brockelbank, 20 Law J., N. S, Ch. Cas. 401.

on the ground of neglect, who thereupon, filed a bill in the Court of Chancery, for an injunction to restrain B. and Co., from excluding him from the management and for an account. Lord Cranworth, V. C., granted the injunction, but upon appeal, the Lord Chancellor, Lord Truro, discharged the order with costs to be paid by S., upon the ground that there was no partnership, that it was simply a contract of hiring and service, the remuneration to be measured with reference to the amount of the profits of the business.

Similar principles have been acted on in criminal cases. Thus, it has been held(*d*) that a person employed by the owner of a colliery, as captain of one of his vessels, to take out coal and sell the same, and bring back the money to his employer; and who was remunerated for his labour, by allowing him two-thirds of the price for which he sold the coals above the price charged at the colliery, was a servant within the meaning of the statute 39 Geo. 3, c. 85, and having embezzled the price of some coal, he was convicted of larceny. All the Judges holding that the mode of paying him for his labour, did not vary the nature of his employment, nor make him less a servant than if he had been paid a certain price per chaldron or per day.

So, where a clerk to a banking firm was to receive one-third of one of the partner's profits, being the fifteenth share of the whole profits of the house, to which the other partners assented, but they considered the clerk not liable to them for losses: it was held that the clerk was not a partner. He was to receive only a sort of per centage, and the agreement was assented to by the partners, merely as a private agreement between the one partner and the clerk. He was to receive a share of the *particular* profits of the one partner, and not of the *general* profits of the firm; and, therefore, he might be guilty of embezzling money received on behalf of the *firm.(*e*) So, where a prisoner was employed by the master of a coal vessel, who sent him with a cargo of coals: and the custom [*34] of the trade was, for the person who superintended the business to receive two-thirds of the freight, and the owner one-third; the prisoner took the whole, whereupon he was indicted and convicted. It was objected that he and the master were joint proprietors of the freight, but a large majority of the judges held the conviction right.(*f*)

And where(*g*) W. engaged "to take charge of the glebe lands of C., his wife undertaking the dairy and poultry at fifteen shillings a-week till Michaelmas, 1850, and afterwards at a salary of 25*l.* a-year, and *a third of the clear annual profit*, after all expenses of rent and rates, labour, and interest on capital, &c., are paid, on a fair valuation made from Michaelmas to Michaelmas. Three months' notice, on either side, to be given, at the expiration of which time the cottage to be vacated by W., who occupies it as bailiff in addition to his salary:" it was held that W. was servant to C., and not a partner.

(*d*) Rex v. Hartley, Russ. & Ry. 139.

(*e*) Holme's case, 2 Lewin, 256, Chambre, J., cited in 2 Russ. on Crimes, 170, 3rd ed.

(*f*) Anonymous, ibid, cited by Chambre, J.; see 2 Russ. on Crimes, 171.

(*g*) Reg. v. Wortley, 21 Law J., N. S., M. C. 44.

But in a case(*h*) where the plaintiff was clerk to the defendant, who was a solicitor, under an agreement, "to become an assistant to R., and to take one-third part of the profits of the business by way and in lieu of a salary, not to be considered as a partnership, and R. agreed to allow T. the above for his share as an assistant:" Sir John Leach, V. C., allowed a demurrer to a bill filed by T. for an account of salary, on the ground that this agreement substantially constituted a partnership, and was contrary to the policy of the statute, 22 Geo. 2, c. 46, s. 11, which prohibited attorneys allowing unqualified persons to practise in their names. And on similar grounds, in another case,(*i*) where an attorney engaged an unqualified person to conduct his business, and agreed to allow him a moiety of the profits of the business, instead of a fixed salary, and the names of both of them were painted on the door of the office, and bills were made out in their joint names; Lord Tenterden ordered [* 35] *the attorney to be struck off the rolls, and the clerk to be sent to prison for a month.

Where the question arises not between the parties themselves, but between one of them and a third person, a distinction of some nicety, and difficult of application to the circumstances of particular cases, has been established between cases in which the agreement was, that the servant, &c., should be remunerated by a portion of the *net* profits; and cases in which the agreement was for a remuneration by a portion of the *gross* earnings, or produce, or by a sum of money calculated in proportion to the profits, or a given share of them. In the former of those cases, he will be considered as a partner, so far as to be liable to third parties as such; it being a well established principle that whoever participates in the profits of a trade or has a specific interest in the profits themselves, as such profits, becomes chargeable as a partner to third persons in respect of transactions arising out of the trade or particular adventure, in the profits of which he is to participate.(*k*) Whilst, in the latter cases, he will not be considered as a partner, even with regard to third persons.

This distinction will, probably, be regarded by the reader as one of considerable subtlety and refinement. It is, however, well established, and though it has often elicited, from Judges and text-writers, expressions of animadversion and regret, it has, nevertheless, been frequently acted upon in practice, and is thought by some writers, at least, to rest on a very just and satisfactory foundation.(*l*)

The distinction, itself, is well illustrated by the case of Dry v. Bos-

(*h*) Tench v. Roberts, 6 Madd. 145, note. See Candler v. Candler, ibid. 141.

(*i*) In re Jackson, 1 B. & C. 270. See Raynard v. Chase, 1 Burr. 2.

(*k*) Gow on Partn. 13, 14.

(*l*) 3 Kent Comm. lect. 43, p. 25, 33, 34, 4th ed. See Story on Part. sects. 36, 52; Cary on Part. 11, note (*i*). Mr. Justice Story states that the Roman law fully recognised the same distinction; which is also well known and fully recognised in the French law. See Story on Part. sects. 50, 51, and he adds, "This coincidence of doctrine, founded upon general reasoning between foreign jurists and the municipal jurisprudence of the common law as to the propriety of the distinction, certainly affords no slight confirmation of its accuracy, and entire conformity to the true principles which ought to regulate the subject." And see also a brochure by Begbie on "Partnership en Commandite."

well.(*m*) That was an action against B. for *the repairs of a lighter. The witnesses first stated that the lighter was the sole property [*36] of A. who let her out to B. and he worked her, and that the two shared her *profits* equally between them. Upon which Lord Ellenborough, C. J., said, "In that case B. was to be considered a partner, and was jointly liable for the repairs done to the lighter. There was here a participation of profit and loss which constituted a partnership." But the agreement with A. subsequently appeared to be, that B., in consideration of working the lighter should receive half her *gross earnings*, and that A. as owner should receive the other half; then Lord Ellenborough observed, that "this was only a mode of paying B. wages for his labour, and was different from a participation in profit and loss; so that under these circumstances, no partnership could be considered as existing between him and the owner of the lighter."

This distinction was frequently recognised and acted upon by Lord Eldon, although he disapproved of it;(*n*) and it has also been recognised by other Judges.

Thus, where(*o*) an agreement was entered into by Mair, the owner of a ship, and Young, the master, that Young was to have in lieu of wages, primage, &c., one-fifth share of the profit or loss of the intended voyage on ship and cargo, and was to follow Mair's instructions, do all the business himself that he could do, and for the rest make the best bargains he could; Lord Ellenborough said, there was "no pretence for saying that the captain was a partner because his wages were to be regulated and paid by reference to a calculation on the profits of the adventure." However, it was sufficient for the decision of that case to hold that Young [*37] was not a partner in the *ship*.

But where(*p*) A. and B. agreed that A. should buy whalebone through B. as his broker, and that B., as a remuneration for his trouble, should receive one-fourth of the profits arising from the sale, and bear one-eighth of the losses; the Court of King's Bench inclined to the opinion that B. *was* a partner in the *profits*, so as to be liable to third persons, though it was not necessary to decide that point, the question in the case before the Court depending upon whether or not B. was interested as a partner in the *whalebone*, which he was held not to be.

The distinction above pointed out is well illustrated by the recent case of Pott v. Eyton and Jones.(*q*) That was an action by the assignees of certain bankrupts to recover money paid by them on account of the

(*m*) 1 Campb. 329; and see Wish v. Small, 1 Campb. 331; Gibbons v. Wilcox, 2 Stark. 43.

(*n*) Ex parte Hamper, 17 Ves. 404, 412; Ex parte Langdale, 18 Ves. 300; Ex parte Watson, 19 Ves. 461; Ex parte Rowlandson, 1 Rose, 91; and see Pott v. Eyton, 3 C. B. 32; Ex parte Chuck, 8 Bing. 469.

(*o*) Mair v. Glennie, 4 M. & S. 240; and see Stocker v. Brockelbank, 20 Law J., N. S., Ch. Cas. 401, where Lord Truro treats the case of Mair v. Glennie, as if it decided that Young was not a partner in the adventure. That was the opinion of the Court, but it would seem to have been unnecessary for the decision of that case, to express that opinion. The question there was, as stated in the text, as to the ownership of the *ship*. A similar observation applies to Meyer v. Sharp, 5 Taunt. 74.

(*p*) Smith v. Watson, 2 B. & C. 401; and see Reid v. Hollinshead, 4 B. & C. 867; Cheap v. Cramond, 4 B. & Al. 670.

(*q*) 3 C. B. 32; and see Barry v. Nesham, 3 C. B. 641.

defendants. The facts were shortly these:—In 1828, Eyton was concerned in a colliery at M., and an agreement was entered into between him and Jones for opening a tally-shop at M., (near the colliery,) principally with a view of supplying goods to the workmen of the colliery. Eyton built the shop, and his name appeared over the door and in the excise licenses, and the invoices of goods supplied to the shop were made out in his name, and he paid for them. Jones managed the shop. The workmen at Eyton's colliery were supplied with goods from it, for which they settled at the colliery when their wages were paid, until 1831.(*r*) From that time they paid at the shop once a fortnight. Jones paid over to Eyton the principal part of the money taken at the shop, as he paid for the goods, but reserved enough for small payments at the shop. Eyton received for his own use 7*l.* per cent. on the amount of all sales to his workmen, and Jones had all the rest of the profits. In 1834, the arrangements were changed: Jones was thenceforth to buy in his own name all goods supplied to the shop, and to receive payment for all goods sold; and Eyton was to receive 5*l.* instead of 7*l.* per cent. on the amount of sales to his workmen. Eyton's name remained over the door till [*38] *October, 1840, when a fire stopped the business. In 1834, when Jones began to buy goods, he opened an account with the bankrupts, who were bankers. The bank failed in 1839, when a balance exceeding 2000*l.* was due to it on that account. Besides the shop at M., Jones, after 1834, opened three more at other places, which he carried on in his own name, on his own account, and supplied with goods from the shop at M. The action was brought against *both* Eyton and Jones to recover the amount due to the bankers. No evidence was given to show that the credit was in fact given to Eyton by the bankers, or that they knew that his name appeared over the shop, or in the licenses, or supposed him to be a partner; and the jury, at the trial, found that he had not shared profit and loss since 1834, when the account was opened, and had not been held out as a partner, and his credit pledged to the bank, and gave their verdict for the defendants. And in the following Term, a rule for a new trial, on the ground that the verdict was against evidence, was discharged; Tindal, C. J., saying, "It was contended, that an actual partnership was proved; for that Eyton by taking 5*l.* per cent. on the sales to his workmen received a share of the profits, and was, therefore, in point of law, a partner as to third persons.(*s*) But we are of opinion that the taking of that money was not sufficient to make him a partner. Traders become partners between themselves by a mutual participation of profit and loss; but, as to third persons, they are partners if they share the profits of a concern; for he who receives a share of the profits receives a part of that fund upon which the creditors of the concern have a right to rely for payment, and is, therefore, to be made liable to losses although he may have expressly stipulated for exemption from them; Grace v. Smith;(*t*) Waugh v. Carver.(*u*) But in the former of those cases Lord Chief Justice de Grey, after laying down the rule of

(*r*) When the truck system was abolished. (*s*) 3 C. B. 39.
(*t*) 2 W. Bl. 998. (*u*) 2 H. Bl. 235.

law in the terms which I have mentioned, proceeds,—'If any one advances or lends money to a trader, it is lent on his general personal security. It is no specific lien upon the profits of the trade, and yet the lender is generally interested in those profits; he relies on them for repayment.' Afterwards, he says, 'I think the true criterion is to inquire whether Smith agreed to share the *profits of the trade with Robinson, or whether he only relied on those profits as a fund [*39] of payment—a distinction not more nice than usually occurs in questions of trade and usury. The jury have said that this is not payable out of the profits.' So, in the present case, the jury have said there was no agreement to share the profits. This distinction has been recognised in many cases; of which it may suffice to mention Dry v. Boswell,(*v*) and Benjamin v. Porteous.(*w*) And although in Ex parte Hamper,(*x*) Lord Eldon said, the distinction was so thin that he could not state it as established upon due consideration, yet he acted upon it in that case; and again, in Exparte Watson,(*y*) where he said, "One who receives a salary not charged upon profits—according to a known though nice distinction—is not by that a partner.' Nor does it appear to make any difference whether the money is received by way of interest on money lent, or wages, or salary as agent, or commission on sales. And it appears to us that in the present case the payment to Eyton was in the nature of commission on certain sales, supposed to be effected through his influence over his workmen, and was not sufficient to render him, as a matter of legal inference, liable as a partner: and so far as it is a question of fact it was disposed of by the jury."

APPRENTICE OR SERVANT.(1)

Another question, which was formerly of more importance than it is

(*v*) 1 Campb. 329, ante, p. 35.
(*w*) 2 H. Bl. 590.
(*x*) 17 Ves. 404.
(*y*) 19 Ves. 459.

(1) The statutes of the several states on the subject of apprenticeship, do not essentially differ among themselves, nor from the English statute. In Vermont and New York, the provisions are almost identical. Children above the age of fourteen years may be bound as apprentices; males to the age of twenty-one and females to the age of eighteen, or to the time of their marriage within that age. This may be done by their father or other legal guardian, and if they have no parent or guardian, with the consent of the selectmen, in Vermont, and by the overseers of the poor, two justices, or a judge in New York. In Vermont the overseers of the poor may bind out the minor children of any person who has become actually chargeable to his town; and in both states, statute provisions also exist to redress the grievances of the apprentice in case he shall have been abused; Rev. Stat. Vt. 1839, c. 66; Rev. Stat. New York, vol. ii. p. 154. In both these states, as in all others whose statutes upon this subject the writer has examined, the apprentice must be bound by deed, and the infant himself must be a party to the indenture, except in the special case of an apprentice who is chargeable as a pauper. This also is the doctrine of the common law. Rev. Stat. Vt. 1839, p. 345; Rex v. Inhabitants of Cremford, 8 East's Rep. 25; King v. Inhabitants of Arnesby, 3 Barn & Ald. 584; Hurney v. Owen, 4 Blackf. Ind Rep. 388; Com'th v. Van Lear, 1 Serg. & Rawle, 250; Supplee's case, 6 Serg. & Rawle, 340; Guthrie v. Murphy, 4 Watts's Rep. 80; Commonwealth v. Jones, 3 Serg. & Rawle, 158.

The father has no authority to bind out his child as an apprentice without his consent; and if the infant does consent and is not a party to the deed, he will not be bound. Rev. Stat. Vt. 1839; New York Rev. Stat. vol. ii. p. 160; Commonwealth v. Moore, 1 Ashm. 123; Squire v. Whipple, 1 Vt. Rep. 69; Reeve's Dom. Rel. 342, note to 2 ed.

at the present day,(z) though even now it may often arise, is whether the agreement into which the parties have entered was intended to create the relationship of master and apprentice, or master and servant.(a) In deciding this point more attention is now paid to the main object of the parties, than to the language used by *them.(b) Formerly it [*40] was held, that unless the word "apprentice" was used, the contract might be considered one of hiring and service.(c) But the cases in which that doctrine was laid down and upheld have long been overruled;(d) and each case is now held to depend upon its own particular circumstances.(e) If the parties appear to have contemplated the relation of master and apprentice, then the contract must be considered as one of apprenticeship;(f) and if it be an imperfect apprenticeship, it cannot be treated as a contract of hiring and service. If, on the other hand, it appear that the parties contemplated the relation of master and servant, then it must be deemed a contract of hiring and service.(g) Where teaching and learning appear to be the primary object of the parties, then, although work is to be done for the master, the contract is to be considered as one of apprenticeship. But if working for the master appear to be the primary object, and teaching and learning the master's trade a mere secondary consideration; the existence of a stipulation by the master to teach, and a corresponding stipulation by the servant to learn, the master's trade, will not alone prevent the contract from being considered one of hiring and service.(h)

TENANT OR SERVANT.

Where a servant occupies premises belonging to his master, as where a coachman occupies rooms over a *stable, or a gardener an [*41] outhouse, or a gamekeeper a lodge in the park, and has on that account less wages, his occupation is, in law, the occupation of his master.(i) And such servants when dismissed from the service, have no right to continue in the occupation of their houses as tenants, nor are they entitled to notice to quit. So, under the law of settlement,

(z) Now that settlement by hiring and service is abolished, ante, p. 2, note (b). One great difference between an apprentice and a servant is, that the latter may be dismissed for misconduct, whilst the former may *not* in general. See Wise v. Wilson, 1 Carr. & K. 662.

(a) See further on this point Burn's Justice, tit. "Poor," 29th ed., pp. 545, &c., and 651, &c.

(b) Rex v. Nether Knutsford, 1 B. & Ad. 730.

(c) Rex v. Little Bolton, 2 Bott. 316; Rex v. Eccleston, 2 East, 298.

(d) Rex v. Rainham, 1 East, 531; Rex v. Laindon, 8 T. R. 379; Rex v. Crediton, 2 B. & Ad. 493; Rex v. Great Wishford, 4 A. & E. 223.

(e) Rex v. King's Lynn, 6 B. & C. 99; Rex v. Edingale, 10 B. & C. 739; Rex v. Northowram, 9 Q. B. 24.

(f) Rex v. Bilborough, 1 B. & Al. 115; Rex v. Crediton, 2 B. & Ad. 493; Rex v. Newton, 1 A. & E. 238; Rex v. Great Wishford, 4 A. & E. 216; Rex v. Ightham, 4 A. & E. 937; Reg. v. Northowram, 9 Q. B. 24.

(g) Per Bayley, J., in Rex v. King's Lynn, 6 B. & C. 99. See Rex v. Great Wishford, 4 A. & E. 222, and Reg. v. Northowram, 9 Q. B. 24.

(h) Rex v. Crediton, 2 B. & Ad. 497; Rex v. Billinghay, 5 A. & E. 676; Reg. v. Northowram, 9 Q. B. 24.

(i) Bertie v. Beaumont, 16 East, 34; Rex v. Stock, 2 Taunt. 329; Reg. v. Rees, 7 C. & P. 568; and see cases of Burglary, 1 Rus. on Cr. 810.

the occupation of a tenement connected with the service, would not confer a settlement, though it would if wholly unconnected therewith.(*k*) So, a servant at an annual salary, who resided in two rooms within the walls of a lighthouse, to take care of the light, was held not liable to be rated as occupier, his occupation being that of his master.(*l*) One of two partners, joint tenants, may authorize a servant to remain in the house where the business is carried on, although the other has given him notice to go.(*ll*) But, a servant was held liable to poor-rate, who took a house not belonging to his master, although his master paid the rent.(*m*)

GENERAL HIRING—YEARLY HIRING, &c.

Where no time is limited either expressly or by implication, for the duration of a contract of hiring and service, the hiring is considered as a general hiring, and in point of law a hiring for a year.(*n*)(1) This rule is applicable to all contracts of hiring and service, whether written(*o*) or unwritten, whether express or implied, and whatever be the nature of the service: and is not confined to servants in husbandry, but extends also to domestic(*p*) and other servants, such as clerks and others.(*q*) But it is not an inflexible rule,(*r*) and *does not apply [*42] where the contract contains stipulations inconsistent with the application of it, or where, from some well known custom upon the subject, the parties may be considered to have contracted with reference to such custom, and thus to have excluded its application.

Nor does the rule apply to cases in which there has been a service, but *no contract* of hiring, and no circumstances from which a contract can be implied.(*s*) And, therefore, where(*t*) an assistant surgeon brought an action against his employer for the amount of salary due to him, and no specific contract of hiring was proved, but evidence was given of the service; and it appeared, that after the plaintiff had been some time in the defendant's service he was taken ill, and went to the hospital, and never returned, nor was asked to return, to his employment; and, that he had been paid different sums of money, but not at any fixed or definite periods: although it was contended on the part of the defendant, that the evidence shewed a yearly hiring, and, therefore, that the plaintiff

(*k*) Rex v. Seacroft, 2 M. & S. 472; Rex v. Minster, 3 M. & S. 276; Rex v. Cheshunt, 1 B. & Ald. 473; Rex v. Iken, 2 A. & E. 147; and see Rex v. Terrott, 3 East, 506; Reg. v. Ponsonby, 3 Q. B. 14.

(*l*) Rex v. Tynemouth, 12 East, 46.

(*ll*) Donaldson v. Williams, 1 Cr. & M. 345.

(*m*) Reg. v. Lynn, 8 A. & E. 379; and see Reg. v. Bishopton, 9 A. & E. 824.

(*n*) Co. Litt. 42 *b;* Fawcett v. Cash, 5 B. & Ad. 904; Lilley v. Elwin, 11 Q. B. 742. There is scarcely a case upon the subject of settlement by hiring and service in which this rule is not admitted, and it is never denied in any one of them.

(*o*) See Elderton v. Emmens, 4 C. B., 479; 6 C. B, 175-6, and in Dom. Proc.

(*p*) See Rex v. Worfield, 5 T. R. 506.

(*q*) Hutman v. Bulnois, 2 C. & P. 511.

(*r*) Baxter v Nurse, 6 M. & G. 935; and see post, p. 43.

(*s*) As there were in Beeston v. Collyer, 4 Bing. 313.

(*t*) Bayley v. Rimell, 1 M. & W. 506; and see Broxham v. Wagstaffe, 5 Jur. 845.

(1) See Hartwell v. Jewett, 9 N. H. 259; Fenton v. Clark, 11 Verm. 557.

having left his situation before the end of the year, could not recover any part of his salary: yet, it was held that there was no evidence to shew a hiring for a year, and the plaintiff recovered for the time he had actually served.

And a contract of hiring cannot be presumed where the circumstances tend rather to rebut such a presumption, as where paupers have been taken to live with their relatives, or others out of charity,(*u*) or where the agreement was for cohabitation, and not for service.(*v*)

But where there has been *a service* for more than a year, and wages paid, without any express contract of hiring, it may be presumed that such service was under a *contract* for a *yearly hiring*.(*w*) And so where [*43] there *has clearly *been a contract*, but not for any definite time, a *yearly* hiring may be inferred;(*x*) and slight circumstances, such as an agreement to find clothes,(*y*) will strengthen that inference. And, if the bargain be originally made for an entire year, but there is also a provision that in a given event it shall be competent to the parties, or either of them, to put an end to or suspend the service for a part of the year—the mere existence of this condition will not render it the less a hiring for a year; a conditional hiring being the same, for most purposes, as an absolute hiring, until the condition is acted upon.(*z*)

And this presumption that a general hiring is a hiring for a *year*, may be greatly strengthened where there appears to be some general custom applicable to the particular trade, or business or occupation, in which the servant is engaged, to hire such servants by the year, and evidence of such custom is always admissible.(*a*) Thus where(*b*) the plaintiff was engaged by the defendant at a weekly salary, to edit a *new* periodical publication, evidence was admitted on the part of the plaintiff, to shew that it was the custom, in the case of editors and other persons regularly employed on newspapers to engage them for the whole year. But as it did not appear that the custom applied to new publications, the jury found a verdict for the defendant on the ground that the plaintiff was not hired for a year, and an application for a new trial was refused.(*c*)

The presumption that a general hiring is a yearly hiring cannot, however, be made where it is excluded by the terms of the contract. If either party, for instance, is at liberty to determine the service, at any

(*u*) Rex v. Pitminster, 2 Bott. 269; Rex v. Weyhill, 2 Bott. 271; Burr. S. C. 491; Rex v. Stokesley, 6 T. R. 757; Rex v. Rickinghall, 7 East, 373; Rex v. Sow, 1 B. & Al. 178.

(*v*) Rex v. Northwingfield, 1 B. & Ad. 912; Bradshaw v. Hayward, Carr. & M. 591.

(*w*) Rex v. Lyth, 5 T. R. 327; Rex v. Long Whatton, 5 T. R. 447; Rex v. Pendleton, 15 East, 449. See Rex v. St. Martin, Leicester, 8 B. & C. 677.

(*x*) Rex v. Macclesfield, 3 T. R. 76; Rex v. Ardington, 1 A. & E. 260; Rex v. Newton, 10 B. & C. 838.

(*y*) Rex v. Worfield, 5 T. R. 506.

(*z*) Rex v. Byker, 2 B. & C. 114; Rex v. Ossett cum Gawthorpe, 4 B. & Ad. 216; Rex v. St. Helen's Auckland, 4 B. & Ad. 718; Reg. v. Walbottle, 9 Q. B. 248; Rex v. Sandhurst, 7 B. & C. 557; and see Rex v. Hurstmonceux, 7 B. & C. 551.

(*a*) It must be proved by instances, and cannot be supported by evidence of opinion merely; Cunningham v. Fonblanque, 6 C. & P. 44.

(*b*) Baxter v. Nurse, 1 Carr. & K. 10; and see Holcroft v. Barber, 1 Carr. & K. 4.

(*c*) 6 M. & G. 638; and see Williams v. Birne, 7 A. & E. 177.

time, without notice, the hiring cannot be considered a yearly hiring,(*d*) *or if the hiring be expressly for less than a year,(*e*) although done purposely to avoid the consequences of a yearly hiring.(*f*) [*44] Or, if the master have not the entire control of the servant during the year, although he pay the servant yearly wages, as if the servant is at liberty when not engaged for his master to work for other people.(*g*)

Or if the agreement be to do work by the job, as to make 70,000 bricks at a certain price, this cannot be considered a yearly hiring: for, although the job may last beyond the year, it does not necessarily last so long.(*h*) But if the hiring be for a year, a mere stipulation for payment by piecework, will not render it less a yearly hiring.(*i*)

And so, if any portion of the year, however short, is *excepted*, during which the servant is not under his master's control, whether that exception be express, or by necessary implication from the terms used,(*k*) the hiring cannot be considered a hiring for a year, so as to confer a settlement, although the contract be for a year's service, subject to such exceptions. Thus, where a man was hired for a year, with liberty to let himself for the harvest month to any other person(*l*)—it was held that he could not gain a settlement by service under such a hiring. So where the servant agreed for liberty to be absent eleven days during the sheep shearing season:(*m*) *or, during the sheap shearing season:(*n*) or, to work shearsman's hours, and be at liberty at all other [*45] times;(*o*) or, as a colt-shearman, to work twelve hours each day:(*p*) or, where the hiring was for a year from Michaelmas, to go away a month at harvest, and make up the time after Michaelmas:(*q*) or, where a bricklayer hired himself for three years, but he was to work only during certain hours each day:(*r*) and, in case of frost, was to have no wages, but to be at liberty to serve another master:(*s*) or, where pay Saturdays and Sundays, were excluded from the days on which the servant was to work:(*t*) or, Sundays only, for a hired servant is always under the government, discipline and control of the master, even on Sundays:(*u*) or

(*d*) Rex v. Great Bowden, 7 B. & C. 249, et cas. ib. cit.

(*e*) Dunsford v. Ridgwick, 2 Salk. 535; Rex v. Standon Massey, 10 East, 576. But a hiring from Whitsuntide to Whitsuntide, although less than 365 days, was held sufficient hiring for a year to confer a settlement; Rex v. Ulverstone, 7 T. R. 564.

(*f*) Rex v. Mursley, 1 T. R. 694; Rex v. Coggeshall, 6 M. & S. 264.

(*g*) Rex v. Polesworth, 2 B. & C. 715; Rex v. Lydd, 2 B. & C. 754; Rex v. Killingholme, 10 B. & C. 802. But if the master have the *entire control* during the year, it is no objection that it is given him by *several contracts;* Reg. v. Ravenstonedale, 12 A. & E. 73.

(*h*) Rex v. Woodhurst, 1 B. & Ald. 325.

(*i*) King's Norton v. Cambden, 2 Str. 1139; Rex v. Birmingham, Cald. 77; Doug. 333.

(*k*) Rex v. Gateshead, 2 B. & C. 117, note, as explained in Rex v. St. Helen's Auckland, 4 B. & Ad. 726; and see Reg. v. Walbottle, 9 Q. B. 259.

(*l*) Rex v. Bishop's Hatfield, 2 Bott. 211; Rex v. Althorne, 2 B. & C. 211.

(*m*) Rex v. Empingham, 2 Bott. 217; Burr. S. C. 791.

(*n*) Rex v. Arlington, 1 M. & S. 622. (*o*) Rex v. Buckland Denham, Burr. S. C. 694

(*p*) Rex v. North Nibley, 5 T. R. 21. (*q*) Rex v. Turvey, 2 B. & Ald. 520.

(*r*) Rex v. Edgmond, 3 B. & Ald. 107. See Reg. v. Northowram, 9 Q. B. 24.

(*s*) See Rex v. Martham, 1 East, 239, that the mere stipulation to stop wages in bad weather would not make a hiring exceptive.

(*t*) Rex v. Cowpen, 5 A. & E. 333.

(*u*) Rex v. Kingswinford, 4 T. R. 219; Rex v. North Nibley, 5 T. R. 21.

where it was agreed that the servant should have a holiday to go to his feast:(*v*) or, where there was a stipulation that each man should, on each *working day*, do a full day's work, and that he should not leave the pit till that work was completed, or should forfeit 2*s.* 6*d.*; as it was therefore, stipulated by implication, that the men were not to be under the control of the master on days which were not working days, nor on any other day as soon as the day's work was completed.(*w*)

Upon the same principle it was also held, that if the *hours* of working were limited, the hiring, although otherwise for a year, could not be considered a yearly hiring for the purpose of conferring a settlement.'(*x*) [*46] *But those principles were held not to apply where the limitation of hours was merely for the purpose of regulating the amount of wages:(*y*) or, where the agreement was to obey the rules of the factory with regard to hours, &c., as that was merely equivalent to an agreement to obey the master's orders, which is implied in every contract.(*z*) And exceptions merely *implied* by custom or usage of trade, were held not to prevent a settlement.(*a*)

Where the only circumstance from which the intended duration of a contract of hiring and service can be inferred, is the reservation of wages weekly, it must be taken to be a weekly hiring. As, where a man hired himself to a plumber and glazier, who was to find him board, lodging and washing, at 6*s.* per week, summer and winter:(*b*) or, where the hiring was merely at so much a week:(*c*) or, where the servant was to live with his master, who was to find him board and lodging, and pay him 2*s.* 6*d.* a week:(*d*) or where a servant in husbandry was to serve for the weekly wages of 4*s.*, board, washing and lodging, except in the harvest month, when his wages were to be increased to 10*s.* 6*d.* per week, and then again reduced to 4*s.*:(*e*) or, where the hiring was at 8*s.* a week, and two guineas for the harvest; to do anything the gardener should set him about:(*f*) or, where a gardener having asked 20*l.* a year, his master refused that, but agreed to give him so much a week.(*g*)

But, if there is anything in the contract of hiring to show that it was

(*v*) Reg. v. Threkingham, 7 A. & E. 866.

(*w*) Rex v. Gateshead, 2 B. & C. 117, note, as explained in Rex v. St. Helen's Auckland, 4 B. & Ad. 726; Reg. v. Walbotte, 9 Q. B. 259. See Rex v. Byker, 2 B. & C. 114.

(*x*) Rex v. Birmingham, 9 B. & C. 925; Rex v. Frome Selwood, 1 B. & Ad. 207; Rex v. Norton Bavant, 3 A. & E. 161; Reg. v. Holbeck, 4 Q. B. 590; Reg. v. Preston, 4 Q. B. 597.

(*y*) Rex v. Ossett cum Gawthorpe, 4 B. & Ad. 216.

(*z*) Rex v. St. John, Devises, 9 B. & C. 896. But see Reg. v. Preston, 4 Q. B. 597, where the hours were limited by a printed notice, with reference to which the agreement was made.

(*a*) Per Lord Mansfield in Rex v. Buckland Denham, Burr. S. C. 694; per Bayley, J., in Rex v. Edgmond, 3 B. & Ald. 110; and see Reg. v. Stoke upon Trent, 5 Q. B. 303.

(*b*) Rex v. Dedham, Burr. S. C. 653; 2 Bott. 292.

(*c*) Rex v. Newton Toney, 2 T. R. 453; Rex v. Odiham, 2 T. R. 622; Rex v. Hanbury, 2 East, 423; Rex v. Mitcham, 12 East, 351. See also Baxter v. Nurse, 6 M. & G. 638, ante, p. 43.

(*d*) Rex v. Puckleehureh, 5 East, 382.

(*e*) Rex v. Dodderhill, 3 M. & S. 243.

(*f*) Rex v. Lambeth, 4 M. & S. 315.

(*g*) Rex v. Warminster, 6 B. & C. 77.

intended to be for a year, the reservation *of weekly wages will not control it. As, where the hiring was at 3*s.* per week *the year round*, with liberty to go on a fortnight's notice; this was held to be yearly hiring.(*h*) So, where the hiring was at weekly wages, with a stipulation for a month's notice to determine the contract; on the ground that it was a hiring, of which no certain portion of time could be predicated for its duration, it was consequently a general hiring, which the law says, is a hiring for a year.(*i*) [*47]

Where the hiring is a yearly hiring, it cannot in general be put an end to by either party before the end of the year. If, therefore, on the one hand, a master wrongfully dismiss his servant during the year, the servant may maintain an action against him for such wrongful dismissal, and a jury would, in some cases, be justified in assessing his damages at the amount of wages which he would have earned, had he been allowed to serve to the end of the year.(*k*) Whilst, on the other hand, a servant wrongfully quitting his master's service, or rightfully dismissed for misconduct during the year, cannot recover any wages for the portion of the year during which he has served.(*l*) The above observation, however, would not of course apply where the agreement was subject to some stipulation, either express or implied by custom, enabling either party to determine the contract by notice—to the case of domestic and menial servants, for instance; with regard to whom, there is a well known rule founded solely on custom, that their contract of service may be determined at any time, by giving a month's warning, or paying a month's wages.(*m*) (1)

*HOW FAR THE MASTER IS BOUND TO FIND WORK FOR THE SERVANT. [*48]

Where the contract of hiring merely contains an undertaking on the part of the master, to pay certain stipulated wages in proportion to the work done by the servant, there is no *implied* obligation on the part of the master to find work.

Thus were the defendant,(*n*) who was the owner of a colliery, entered

(*h*) Rex v. Birdbrooke, 4 T. R. 245.

(*i*) Rex v. Hampreston, 5 T. R. 205; Rex v. Great Yarmouth, 5 M. & S. 114; Rex v. Pershore, 8 B. & C. 679.

(*k*) See Beeston v. Collyer, 4 Bing. 309. The action for wrongful dismissal is treated of, post.

(*l*) Spain v. Arnott, 2 Stark. 256; Turner v. Robinson, 6 C. & P. 15; S. C. 5 B. & Ad. 789; Ridgway v. Hungerford Market Company, 3 A. & E. 171; Lilley v. Elwin, 11 Q. B. 742.

(*m*) Fawcett v. Cash, 5 B. & Ad. 908; Beeston v. Collyer, 4 Bing. 313; and see Williams v. Birne, 7 A. & E. 183. In Nowlan v. Ablett, 2 Cr. M. & R. 54, a head gardener at 100*l.* a year, who resided in a detached house belonging to his master, was held to be a menial servant, and only entitled to a month's warning. See Johnson v. Blenkinsopp, 5 Jur. 870. In Louth v. Drummond, Kingston Spring Ass. 1849, (see the *Times*, March 28,) Parke, B., left it to the jury to say what notice a farm bailiff was entitled to, and they said that the master was not justified in giving only a month's notice, and gave a verdict for a year's wages.

(*n*) Williamson v. Taylor, 5 Q. B. 175; and see Lees v. Whitcomb, 5 Bing. 34; Sykes v. Dixon, 9 A. & E. 693, ante, p. 21.

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(1) See Costegan v. Mohawk, 2 Denio R. 609; Monnell v. Burns, Id. 121.

into an agreement with the colliers and workmen, and amongst others the plaintiff, whereby the said owner retained and hired the other parties thereto "to hew, work, fill, drive, and put coals, and to do such other work as may be necessary for carrying on the said colliery as they shall be required or directed to do by the said owners, their executors," &c., "or their viewers or agents, at the respective rates and prices and on the terms," &c., following: "First, the said owners agree to pay the said hereby hired parties once a fortnight, upon the usual and accustomed day, the wages by them earned at the following rates, viz." (specifying the rates, with regulations as to the manner of working.) "Fifth: the said parties hereby hired shall, during all the times the pit shall be laid off work, continue the servants of the said owners, subject to their orders and directions, and liable to be employed by them at such work as they shall see fit. Sixth: the said hewers hereby hired shall, when required, except when prevented by sickness or other sufficient unavoidable cause, do and perform a full day's work on each and every working day, or such quantity of work as shall be fairly deemed equal to a day's work not exceeding eight hours, and shall not leave their work until such day's work or quantity of work is fully performed or finished to the extent of each man's ability; and in default thereof each of the said parties hereby hired and so making default shall, for every such default, forfeit and pay [*49] to the said owners, their executors," *&c., 2*s.* 6*d.* "The pit to commence coal work at such times in the morning as shall be required to suit the trade." Then followed other clauses not material here: It was held, that the agreement contained no promise on the part of the defendant to employ the plaintiff at reasonable times for a reasonable number of working days during the term; and that no action would lie against the defendant for not doing so, although the plaintiff was thereby unable to earn wages.

But where the contract of hiring provides for payment of certain wages (not in proportion to the work done,) although it is optional on the part of the master to find work, and he may, if he pleases, discontinue his business; yet he must nevertheless pay the wages agreed on, whether he find work for the servant or not, or he will render himself liable to an action for such damages as a jury may think proper to give.(*o*)

Thus where the plaintiff agreed to manufacture for the defendant, with the materials and machinery to be provided by him, cement of a certain quality; and on condition of his doing so, the defendant agreed to pay the plaintiff weekly four pounds for two years, and five pounds weekly for the following year, and then to receive him as a partner,—the plaintiff also further agreed to teach the defendant how to manufacture certain kinds of cement: each party bound himself in a penal sum to fulfil the agreement, and the defendant afterwards covenanted by deed for the performance of the agreement on his part: It was held, that the stipulations in the agreement did not raise an implied covenant that the defendant should employ the plaintiff in the business during three or two years,

(*o*) We shall see hereafter, that a servant in such case cannot, if discharged by his master, recover the wages agreed on by offering to serve and remaining idle, but only damages for the wrongful discharge.

although the defendant was bound by express words to pay the plaintiff the stipulated wages during those periods respectively, if the plaintiff performed or was ready to perform the conditions precedent on his part.(*p*)

And where(*q*) a declaration in covenant stated that by deed, between the defendant, D., and the plaintiff, the plaintiff covenanted that D. should for five years from *the date, serve the defendant in the art of a surgeon dentist, and attend for nine hours each day; and the [*50] defendant, in consideration of the services to be done by D., covenanted with the plaintiff, that he the defendant, would, during the five years (in case D. should faithfully perform his part of the agreement, particularly as to the nine hours, but not otherwise,) pay D. 35*s.* per week for the first year, 2*l.* per week for the second and third, and 2*l.* 2*s.* per week for the fourth and fifth; that D. was in the service for some time after the making of the deed till dismissed, and during all that time faithfully performed service, &c., and was willing and tendered to perform, &c., to the end of the five years, but the defendant during the term, refused to permit D. to remain in his service and dismissed him: It was held, on motion in arrest of judgment, that the declaration did not show any covenant corresponding to the breach.

And where(*r*) the plaintiff was appointed the permanent solicitor to a joint stock company, at a salary of 100*l.* per annum, in lieu of rendering an annual bill of costs for business transacted by him for the company, for which salary, he was to advise and act for the company on all occasions, in all matters connected with the company, with certain exceptions: it was held, by the Court of Exchequer Chamber,(*s*) that the agreement created the relation of attorney and client, and that the company was bound to continue that relation at least for a year, or pay the plaintiff his 100*l.*; but the company was not bound to supply the plaintiff with business as an attorney and solicitor at all events, or to require his services as attorney or solicitor, whenever they had occasion for the advice or services of an attorney or solicitor.

However, where the contract of hiring is capable of such a construction, the Courts seemed disposed to imply an agreement on the part of the master, to find work, if that is necessary to enable the servant to earn wages. Thus, in Pilkington v. Scott,(*t*) it was held, that a stipulation in an agreement, whereby a workman was to be paid by the piece, that his masters should pay him a moiety of his wages during any depression of trade, and might dismiss him on giving him a month's wages, or a *month's notice, distinguished the case from that of Aspden v. Austin, and that looking at the whole of the agreement, the [*51] master was bound to employ the servant in the sense of finding him actual employment, so as to enable him to earn wages, subject to the condition of notice. And a similar decision was made in the case of Hartley v. Cummings,(*u*) where there was an engagement on the part of the master

(*p*) Aspden v. Austin, 5 Q. B. 671. (*q*) Dunn v. Sayles, 5 Q. B. 685.
(*r*) Elderton v. Emmons, 6 C. B. 160. See this case in Dom. Proc.
(*s*) Reversing the judgment of the Court of Common Pleas, 4 C. B. 479.
(*t*) 15 M. & W. 657. See the agreement, ante, p. 21.
(*u*) 5 C. B. 247. See this case, ante, p. 22.

to find the servant other work, in the event of the master not requiring the piece work-stipulated for, so as to enable the servant to earn a certain amount of wages per week.

AGREEMENTS IN RESTRAINT OF TRADE CONTAINED IN CONTRACTS OF HIRING AND SERVICE.(1)

It frequently happens that professional men, manufacturers and tradesmen, on taking clerks, apprentices, servants and workmen, into their employ, require them to enter into an agreement, that they will not on leaving their service, carry on a profession, manufacture or trade, similar to their own within certain limits: and this is done with a view to secure themselves from competition with those who having been in their service, have thereby had opportunities of becoming acquainted with their mode of carrying on business, and secrets of trade, and of insinuating themselves into the good graces of their master's customers.(*v*)

All agreements of this sort in *general* restraint of trade, are illegal and void, and cannot be enforced either at law or in equity; and it makes no difference whether they are under seal or not, or whether they are made with or without consideration: it being contrary to public policy, that any one should bind himself *generally* not to carry on his lawful trade.(*w*)

[*52] *But, where the plaintiff, who for many years had carried on the business of a carrier(*x*) from London to St. Ives, and thence to Wisbeach, sold and assigned the good-will of his business to the defendants, and covenanted with them that he would not at any time from

(*v*) As to how far agreements made by workmen to work for a particular master for a long period at certain wages, *and no one else*, are illegal as being in restraint of trade, where there is no corresponding obligation on the part of the master to find work, see Pilkington v. Scott, 15 M. & W. 657; Hartley v. Cummings, 5 C. B. 247. See these cases, ante, pp. 21, 22.

(*w*) Com. Dig. tit. "Trade," D. 3; Clerk v. Tailors of Exeter, 3 Lev. 241; Ipswich Tailors' case, 11 Rep. 53 a; Mitchell v. Reynolds, 10 Mod. 130; S. C. 1 P. Wms. 181; S. C. 1 Smith's L. C. 171, where all the cases are collected and commented upon; and see also 3 Byth. Conv. 3rd ed., 458, where the cases are also collected; Hinde v. Gray, 1 M. & G. 195. Contracts of this nature could not be enforced by the Roman law; see Puff. lib. 5, cap. 1, § 3; and see Puff. lib. 5, cap. 5, § 7, as to monopolies. It may be well here to mention, that the case in the Year Books, 2 H. 5, fo. 5, pl. 26, which is sometimes, though inaccurately, cited as an authority that an agreement in *general* restraint of trade is void (see Com. Dig. tit. "Trade," D. 3; 1 Smith's L. C. 182; 3 Byth. Conv. 458,) is not an authority for that position (though the position is incontestible;) for in the case in the Year Book the restraint was limited in point of space, viz., "deins le ville ou le pl,' etc." The real reason why the bond in that case was held bad (if indeed it *was* held bad, for in Broad v. Jollyfe, Cro. Jac. 596, it is said that the bond in the case in the Year Book was "allowed good") was, that no circumstances appeared to shew it to be reasonable; see Prugnell v. Gosse, Aleyn, 67; S. C. Cro. Eliz. 872; Claygate v. Bachelor, Owen, 143, and see also Hutton v. Parker, 7 Dowl. 739. The case in the Year Book is only an authority that a restraint of trade in a *particular place* is bad, unless circumstances are recited or averred shewing it to be reasonable; and for this purpose it is cited by Parke, B., in his judgment in Mallan v. May, 11 M. & W. 665.

(*x*) Wallis v. Day, 2 M. & W. 273. As to the dictum in that case that a contract to serve another for life must be by deed, see 1 Smith's L. C. 183 d, note to Mitchell v. Reynolds.

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(1) See Mr. Wallace's note, 1 Smith's L. C., p. 380, 3rd Am. ed. 1847.

thenceforth, during the term of his natural life, either by or for himself, or for or with any other person whomsoever, in trust for him, or to or for his benefit, set up, exercise, or in any sort or manner howsoever, use or follow the trade or business of a carrier, except as thereinafter was excepted, and that the plaintiff should, and would from thenceforth during his life, well and faithfully serve the defendants, as an assistant in the said trade, or business of a carrier, &c.: and the defendants covenanted to pay the plaintiff certain weekly sums: It was held, that the agreement was not void, as being in general restraint of trade.

"And it may often happen that individual interest and *general convenience, render engagements not to carry on a trade, or [*53] to act in a profession in a *particular place* proper. Manufactures or dealings cannot be carried on to any great extent, without the assistance of agents and servants. These must soon acquire a knowledge of the manufactures or dealings of their employers. A merchant or manufacturer would soon find a rival in every one of his servants, if he could not prevent them from using to his prejudice the knowledge acquired in his employ. Engagements of this sort between masters and servants are not injurious restraints of trade, but securities necessary for those who are engaged in it. The effect of such contracts is to encourage rather than cramp the employment of capital in trade and the promotion of industry."(*y*)

Accordingly, reasonable agreements in *partial* restraint of trade have always been held to be valid. For partial restraints, however, there must be some consideration; otherwise they are impolitic and oppressive.(*z*) Without a consideration such an agreement, if under seal, would be unreasonable;(*a*) and if not under seal, would be nudum pactum.(*b*) If, however, there appears to be *a* consideration, courts of law will not inquire into the adequacy of it.(*c*)

The law upon the subject of agreements in restraint of trade is admirably stated by Parke, B. in Mallan v. May.(*d*) In that case, by an agreement under seal, it was agreed that the defendant should become assistant to the plaintiffs in their business of surgeon-dentists for four years; that the plaintiffs should instruct him in the business, and that after the expiration of the term, the defendant should not carry on that business in London or in any of the towns or places in England or Scotland where the plaintiffs might have been practising before the expiration of the said service. The agreement, so far as related to not carrying on the business in London, was held valid, but the remainder of the restriction was held unreasonable and void. And in *giving judg- [*54] ment, Parke, B., said, "The rule as laid down by Lord Macclesfield(*e*) and Lord Chief Justice Willes(*f*) is, that total restraints of trade,

(*y*) Per Best, C. J., in Horner v. Ashford, 3 Bing. 326.
(*z*) Prugnell v. Gosse, Aleyn, 67; Claygate v. Batchelor, Owen, 143; S. C. Cro. Eliz. 872, nom. Colgate v. Bachelor.
(*a*) See Hutton v. Parker, 7 Dowl. 739; Mallan v. May, 11 M. & W. 665.
(*b*) Hitchcock v. Coker, 6 A. & E. 438. (*c*) Ibid.
(*d*) 11 M. & W. 653. (*e*) In Mitchell v. Reynolds, 1 P. Wms. 180.
(*f*) Willes, 388, Gunmakers' Company v. Fell.

which the law so much favours, are absolutely bad, and that all restraints, though only partial, if nothing more appear, are presumed to be bad; but, if the circumstances are set forth, that presumption may be excluded, and the court are to judge of those circumstances and determine whether the contract be valid or not; Mitchell v. Reynolds.(*g*) 'Contracts in restraint of trade are in themselves, if nothing shew them to be reasonable, bad in the eye of the law;' per Tindal, C. J., in Horner v. Graves.(*h*) Therefore, if there be simply a stipulation, though in an instrument under seal, that a trade or profession shall not be carried on in a particular place, without any recital in the deed, and without any averments shewing circumstances which rendered such a contract reasonable, the instrument is void. Such are the cases cited in Prugnell v. Gosse,(*i*) and the case of The Ten Tailors of Exeter v. Clarke,(*k*) and Claygate v. Bachelor;(*l*) Year Book, 2 H. 5, fo. 5.(*m*) But if there are circumstances recited in the instrument (or probably if they appear by averment,) it is for the court to determine whether the contract be a fair and reasonable one or not, and the test appears to be—whether it be prejudicial or not to the public interest, for it is on grounds of public policy alone that these contracts are supported or avoided. Contracts for the partial restraint of trade are upheld—not because they are advantageous to the individual with whom the contract is made, and a sacrifice pro tanto of the rights of the community, but because it is for the benefit of the public at large that they should be enforced. Many of these partial restraints on trade are perfectly consistent with public convenience and the general interest, and have been supported; such is the case of the disposing of a shop in a particular place, with a contract on the part of the vendor not to carry on a trade in the same place. It is *in [*55] effect the sale of a goodwill, and offers an encouragement to trade, by allowing a party to dispose of the fruits of his industry; Prugnell v. Gosse;(*n*) Broad v. Joliffe;(*o*) Jelliott v. Broad.(*p*) And such is the class of cases, of much more frequent occurrence, and to which this present case belongs, of a tradesman, manufacturer, or professional man taking a servant or clerk into his service, with a contract that he will not carry on the same trade or profession within certain limits; Chesman v. Nainby.(*q*) In such a case the public derives an advantage in the unrestricted choice which such a stipulation gives to the employer of able assistants, and the security it affords that the master will not withhold from the servant instruction in the secrets of his trade, and the communication of his own skill and experience, from the fear of his afterwards having a rival in the same business."

Upon these principles agreements in partial restraint of trade have, in a variety of instances been upheld and enforced. Thus in Chesman v. Nainby,(*q*) where the defendant, who was a linen draper, on taking the plaintiff's wife, before marriage, into her service, made her enter into a

(*g*) 1 P. Wms. 196.
(*h*) 7 Bing. 744.
(*i*) Aleyn, 67.
(*k*) 2 Show. 350.
(*l*) Owen, 143. See S. C. Cro. Eliz. 872, nom. Colgate v. Bachelor.
(*m*) See note, ante, p. 52, as to this case in the Year Book.
(*n*) Aleyn, 67.
(*o*) Cro. Jac. 596.
(*p*) Noy. 98.
(*q*) 2 Ld. Raym. 1456; S. C. 2 Str. 739.

bond not to carry on the business of a linendraper within half a mile of the defendant's house, the bond was held good.

And so where the defendant,(r) in consideration that the plaintiff, who was a tallyman, would take him into his family and instruct him in the trade, with a provision of meat, &c., and an allowance of twenty pounds wages a year, promised to serve the plaintiff for five years, and not to exercise the trade himself for seven years after the time within the city and liberty of Westminster and bills of mortality; the agreement was held good.

And in another case(s) where the defendant, in consideration of the plaintiff's taking him into his service as assistant in the business of a surgeon, &c., agreed with the plaintiff not to exercise that business on his own *account within the distance of ten miles from Thetford, where the plaintiff resided, for fourteen years; the agreement was held good. [*56]

And in a recent case,(t) an agreement by the defendant, in consideration, that the plaintiff would engage him as assistant to the plaintiff as a surgeon and apothecary, that the defendant would not at any time practice in his own name, or in the name or names of any other person or persons as a surgeon or apothecary at M., or within seven miles thereof, was also held good.

When an agreement not to carry on a trade within a certain distance of a particular place has been established, the distance should be measured by the nearest mode of access, and "that is to be considered the nearest way of access which a person, making the best of his way from house to house, would be likely to take: that is, using the footway where there was one and where it was most convenient to use it, and the carriage way, either where it could be most conveniently used, or where there is no footpath."(u) And "the nearest mode must be taken according to the existing state of the streets. If, subsequently to the covenant, the covenantor took a public-house, the distance of which, by the then shortest way of access, would be greater than that agreed upon from the one he sold, and a new street were afterwards opened whereby the distance by the shortest way of access, became less than that mentioned in the covenant, the covenantor would thereupon incur a breach of covenant."(v)

But although agreements in partial restraint of trade are in many cases upheld, yet, in order to be valid, they must be *reasonable* even though under seal.(w) The question, whether or not any particular agreement of this sort is reasonable, is one for the determination of

(r) Colmer v. Clark, 7 Mod. 270; S. C. Cas. temp. Hardwicke, 53.

(s) Davis v. Mason, 5 T. R. 118; and see Hayward v. Young, 2 Ch. Rep. 407, where a bond by an apothecary not to set up business within twenty miles was upheld.

(t) Sainter v. Ferguson, 7 C. B. 716.

(u) Per Park, J., in Leigh v. Hind, 9 B. & C. 775; and see Atkyns v. Kinnier, 19 Law J., N. S., Exc. 132. But see Reg. v. The Inhabitants of Saffron Walden, 9 Q. B. 76.

(v) Per Littledale, J., in Leigh v. Hind, ubi supra.

(w) See Hutton v. Parker, 7 Dowl. 739, and cas. cit. infra.

the court.(x) No certain precise boundary can be laid down, within which the restraint would be reasonable, and beyond which, excessive. [*57] But "a better test *cannot be applied to the question—whether reasonable or not, than by considering whether the restraint is such only as to afford a fair protection to the interests of the party in favour of whom it is given, and not so large as to interfere with the interests of the public. Whatever restraint is larger than the necessary protection of the party can be of no benefit to either,—it can only be oppressive, and if oppressive, it is, in the eye of the law unreasonable."(y)

Applying this text to an agreement,(z) whereby the defendant covenanted with the plaintiff that he, the defendant, would faithfully serve the plaintiff as an assistant in the business and profession of a surgeon-dentist for five years: and the plaintiff, in consideration of such service and of the covenants of the defendant, did covenant with the defendant to pay him the yearly salaries therein mentioned, and to instruct him in the business or profession of a surgeon-dentist: and the defendant covenanted that he would, during the said term of five years, faithfully and diligently serve the plaintiff as his assistant, and would not depart from his service without giving him three calendar months' notice in writing of such his intention; "and that the defendant should not nor would, at the expiration or other sooner determination of the said term (provided the said plaintiff were then living and practising in the said business or profession,) exercise and practise the said business or profession at or within the distance of one hundred miles of the city of York, without the previous consent in writing of the said plaintiff, under the penalty of 1000*l.*: the restriction was held unreasonable, and judgment arrested.

Upon the same principle, part of the agreement in Mallan v. May,(a) —that part namely which restrained the defendant from practising as a [*58] surgeon-dentist in *any of the towns or places in England or Scotland where the plaintiffs, or the defendant on their account, might have been practising before the expiration of the defendant's service,—was held to be unreasonable and void. And in Price v. Green,(b) a covenant not to carry on the trade of a perfumer, toyman, and hair merchant within the cities of London and Westminster *and the distance of six hundred miles from the same respectively*, was held to be void as to the six hundred miles, though good as to London and Westminster.

But agreements not to carry on the business of an attorney in London, or the distance of one hundred and fifty miles round;(c) or in Great Britain for the space of twenty years;(d) have been held not unreason-

(x) Homer v. Ashford, 3 Bing. 322; Mallan v. May, 11 M. & W. 653.

(y) Per Tindal, C. J. in Horner v. Graves, 7 Bing. 743; and see Mallan v. May, ubi supra; Ward v. Byrne, 5 M. & W. 548, 561; Procter v. Sargent, 2 M. & G. 32. As to how far an agreement to serve a particular master, and no one else, for seven years, is void, as being an unreasonable restraint of trade, where the master is not bound to employ the servant, see Hartley v. Cummings, 5 C. B. 247, ante, p. 22.

(z) Horner v. Graves, ubi supra; and see Young v. Timmins, 1 Cr. & J. 331.

(a) 11 M. & W. 653, ante, p. 53.

(b) 16 M. & W. 346; and see Nicholls v. Stretton, 10 Q. B. 346.

(c) Bunn v. Guy, 4 East, 190; and see Galsworthy v. Strutt, 1 Exc. 659.

(d) Whitaker v. Howe, 3 Beav. 383; but see as to this case, post, p. 60.

able. And "five miles from Northampton Square in the county of Middlesex," in the case of a milkman,(*e*) and "London," in the case of a surgeon-dentist, were considered not unreasonable distances.(*f*)

In the case of an agreement in partial restraint of trade *not under seal*, it is necessary, not only that it should be reasonable, but also that there should appear to be *a consideration* to support it,—otherwise it would be merely nudum pactum and void. An opinion at one time prevailed,(*g*) or, more accurately speaking, was supposed to prevail, that the courts would also inquire into the adequacy of the consideration. But that opinion is now entirely exploded.(*h*)

If an agreement in partial restraint of trade be in other respects valid, it is no objection that the restraint be imposed for the whole life of the party subject to it. Thus where it appeared that the plaintiff,(*i*) who was *a druggist, had taken the defendant into his service as an assistant at a certain annual salary, and in consideration thereof [*59] the defendant agreed, that if he "should *at any time thereafter*, directly or indirectly, in his own name or in the name of any other person, use, exercise, carry on or follow the trades or businesses of a chemist and druggist, or either of them, within the town of Taunton, in the county of Somerset, or within three miles thereof," then he would pay to the plaintiff 500*l.* for liquidated damages: it was held, that the agreement was not void merely on the ground of the restriction being indefinite as to duration, the same being in other respects a reasonable restriction.

And so where the defendant,(*k*) on becoming assistant to the plaintiff, who was a surgeon, entered into a bond not to practice as a surgeon at or within ten miles of S., *at any time*, without the consent in writing of the obligee: it was held, that the restraint was not confined to the lifetime of the obligee, but was co-extensive with that of the obligor; and that there was nothing illegal in the restriction being indefinite as to duration, the same being in other respects a reasonable restriction. So a covenant not to carry on the trade of a butcher within five miles, was held good, although indefinite in point of duration.(*l*)

And as, on the one hand, the indefinite duration of a restriction will not invalidate the contract whereby that restriction is imposed, if in other respects reasonable; so, on the other hand, the definite limitation of a restriction in point of time will not render valid a restraint in other respects unreasonable. Thus, where the defendant,(*m*) upon entering the service of the plaintiff, who was a coal merchant, as town traveller and

(*e*) Proctor v. Sargent, 2 M. & G. 20.

(*f*) Mallan v. May, 11 M. & W. 653, ante, p. 53. In that case "London" was held to mean the *city* of London.

(*g*) See per Alderson, B., in Pilkington v. Scott, 15 M. & W. 660.

(*h*) Hitchcock v. Coker, 6 A. & E. 456; and see also Archer v. Marsh, 6 A. & E. 959; Leighton v. Wales, 3 M. & W. 551; Pilkington v. Scott, ubi supra; Sainter v. Ferguson, 7 C. B. 716; and see per Parke, B., in Moss v. Hall, 5 Exc. 49, 50.

(*i*) Hitchcock v. Coker, 6 A. & E. 438.

(*k*) Hastings v. Whitley, 2 Exc. 611; and see a similar agreement upheld in Sainter v. Ferguson, 7 C. B. 716.

(*l*) Elves v. Croft, 19 Law J., N. S., C. B. 385.

(*m*) Ward v. Byrne, 5 M. & W. 548; and see Hinde v. Gray, 1 M. & G. 195; Procter v. Sargent, 2 M. & G. 20.

collecting clerk, gave him a bond conditioned (inter alia) that he should not, within two years after leaving the plaintiff's service, solicit or sell to any customers of the plaintiff; that he should not follow or be employed in the business of a coal merchant for nine months after he should have left the plaintiff's employ, and that he should not leave his employment without giving a month's notice: it was *held, that the bond [*60] was void, as being in general restraint of trade, and that the restriction being limited in point of time did not render it valid.

A case,(*n*) however, has been decided in equity somewhat at variance with Ward v. Byrne, in which Lord Langdale, M. R., enforced, by injunction, an agreement entered into by an attorney not to practice in Great Britain for the space of twenty years, without the consent of the person to whom he had sold his business. Of this case Patterson, J., is reported to have said,(*o*) "I cannot help thinking that the Master of the Rolls there must have proceeded on the ground that the limitation was for twenty years only." And on Ward v. Byrne being cited, the same learned Judge observed, "I do not see how that case can be reconciled with Whitaker v. Howe." It must be observed, however, that in Whitaker v. Howe, the restriction *was* limited as to space, viz. to Great Britain; but in Ward v. Byrne the restriction was not limited at all as to space, though it was as to time. The decision in Whitaker v. Howe, therefore, *may* only amount to this, that the whole of Great Britain is not an unreasonable restriction on the sale of the goodwill of an attorney's business. If it be considered as a decision that a general restraint on trade, unlimited except in point of duration, is good, it is conceived that it cannot be supported, being at variance with all the earlier authorities.

Together with the cases in which contracts in partial restraint of trade have been upheld, may be classed those in which a servant or clerk enters into a contract not to interfere with or solicit the business of those persons who are his employer's customers. Such agreements are in general valid, whether the customers are named in a schedule or not.(*p*) Thus, where an articled clerk(*q*) to an attorney, in consideration of the attorney taking him as an articled clerk without any premium, covenanted that he would not, during the *articles or at any time after their expira- [*61] tion, interfere with or act as attorney or agent for any person who had already been, or who should from time to time thereafter become or be, the client or correspondent in business of the attorney or any partner of his, or any person to whom he might sell his business: it was held that the attorney might recover in respect of breaches of covenant with regard to persons who had been his clients before and at the time of making the deed, and of persons who had been his clients whilst the clerk continued under articles.

(*n*) Whitaker v. Howe, 3 Beav. 383; see Bryson v. Whitehead, 1 S. & St., where an agreement not to carry on the business of a dyer for twenty years was considered too large.

(*o*) In Nicholls v. Stretton, 10 Q. B. 353; and see S. C. 7 Beav. 42.

(*p*) Hunlock v. Blacklowe, 1 Wms. Saund. 156; Raunie v. Irvine, 7 M. & G. 269; Nicholls v. Stretton, 10 Q. B. 346.

(*q*) Nicholls v. Stretton, ubi supra.

Upon similar principles a person may, by agreement, restrain himself *generally* from the use of a particular secret in his trade.(*r*)

If an agreement in restraint of trade is partly good and partly bad, and the good part can be separated from the bad without injury to the sense, the good part will be upheld and the bad part rejected.(*s*)

But an agreement in restraint of trade is not binding on the executors of the party restrained, so as to prevent *their* carrying on the prohibited trade.(*t*)

The performance of a contract in restraint of trade is usually secured by a bond or covenant not to do that which it is intended to prohibit, and, in the event of a breach of that stipulation, to pay a certain sum as liquidated damages.(*u*) In contracts of this sort, where the damages "are capable of accurate measurement, the terms 'liquidated damages' are to be construed as a penalty. But if there be a contract, the breach of which cannot be measured, then the Courts have held that the parties mean what they say, for this reason—that the subject-matter of the covenant is incapable of valuation."(*v*) Upon this principle, as it is almost *impossible to calculate the precise amount of damage which one person has sustained by the competition of another, who has been [*62] carrying on his trade in the neighbourhood after having contracted not to do so, the Courts have almost, if not quite, invariably held in such cases, that the parties meant what they said, and the plaintiffs have recovered the whole amount of the stipulated penalty.

And where a person has entered into a valid binding contract not to carry on his business in a particular place or manner, to the injury of another, Courts of equity will restrain him from doing so by injunction.(*w*) This is often a more complete and effectual remedy than an action for the penalty agreed upon. And it seems that the jurisdiction of Courts of equity to restrain by injunction an act which a defendant is by contract or duty bound to abstain from, is not confined to cases in which those Courts have jurisdiction over the acts of a plaintiff; the want of mutuality in the contract affords no objection to the exercise of the jurisdiction.(*x*)

But Courts of equity will not grant an injunction where a party, who is entitled to the benefit of an agreement not to carry on a trade under a stipulated penalty as *liquidated damages*, has, in an action at law for

(*r*) Bryson v. Whitehead, 1 Sim. & St. 74.

(*s*) Chesman v. Nainby, 2 Str. 739; S. C. 2 Ld. Raym. 1456; Mallan v. May, 11 M. & W. 653; Price v. Green, 16 M. & W. 346; Nicholls v. Stretton, 10 Q. B. 346; and see Bryson v. Whitehead, 1 Sim. & St. 74.

(*t*) Cooke v. Colcraft, 2 W. Bl. 856; S. C. 3 Wils. 380. Semble, however, that the restraint in that case was void, being in general restraint of trade.

(*u*) Shackle v. Baker, 14 Ves. 468.

(*v*) Per Parke, B., in Atkyns v. Kinnier, 19 Law J., N. S., Exc. 132; S. C. 4 Exc. 776; and see Kemble v. Farren, 6 Bing. 141; Horner v. Flintoff, 9 M. & W. 678; Price v. Green, 13 M. & W. 701; Galsworthy v. Strutt, 1 Exc. 659.

(*w*) Whitaker v. Howe, 3 Beav. 383; Nicholls v. Stretton, 7 Beav. 42. See French v. Macale, 2 Dr. & W. 275, where Lord St. Leonard's states the general rule of equity to be, that "if a man covenant to abstain from doing a certain act, and agree that if he do it he will pay a sum of money, it would seem that he will be compelled to abstain from doing that act, and he cannot elect to break his engagement by paying for his violation of the contract." See also Gerard v. O'Reilly, 3 Dr. & W. 414.

(*x*) Dietrichsen v. Cabburn, 2 Ph. 52; Morris v. Coleman, 18 Ves. 437; but see Hills v. Croll, 2 Ph. 62.

breach of the agreement, recovered judgment for the full amount of stipulated penalty; as in that case the Court will consider that he has purchased the right to do the act, and to restrain his doing it would be telling him that he should not have the full benefit of his purchase.(*y*)

[*63]

*CHAPTER III.

THE DUTIES OF THE SERVANT TO THE MASTER, AND THE RIGHTS AND REMEDIES OF THE MASTER TO ENFORCE THE PERFORMANCE OF THEM.

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Firstly.—As between the Master and Servant.

It is not proposed, in the present work, to enter upon a discussion of the *moral* duties of a servant towards his master; neither is it proposed, *in this chapter*, to consider the cases in which the *criminal* law prescribes punishment for misconduct on the part of a servant. That part of the subject will be treated of hereafter.(*a*) This chapter will be confined to a consideration of the *duties which are *civilly* binding upon a servant, and the *civil* remedies open to a master who has sustained injury by the breach of such duties. [*64]

DUTIES OF SERVANT TO MASTER, AND ACTION BY MASTER AGAINST SERVANT FOR BREACH THEREOF.

In the first place it is clearly the duty of a person who has engaged to enter into the service of another, in any capacity, to fulfil his engagement by entering into such service; and if he fail to do so, without any good reason, he will be liable to an action for such breach of contract. As where a man agreed to go out to Australia in the plaintiff's ship, as surgeon, but afterwards refused to go, the plaintiff recovered damages in

(*y*) Sainter v. Ferguson, 1 MacN. & G. 286; but see Hardy v. Martin, 1 Cox, 26; Tall v. Rayland, 1 Ch. Cas. 183; Barret v. Blagrave, 5 Ves. 555; French v. Macale, 2 Dr. & W. 269, supra n. (*w*).

(*a*) Post, ch. 8 & 9.

an action against him.(*b*) Since, however, a master would rarely deem it worth his while to bring an action against a servant who had engaged to enter his service for refusing to do so,—except, perhaps, in the case of a superior skilled workman,—it will be sufficient upon that subject to observe, that to enable a master to sustain such an action it would, of course, be necessary for him to prove a *legally binding* contract of hiring and service.(*c*)

So, also, it is equally clearly the duty of every person who has *entered into* the service of another to continue in such service during the whole time that he has contracted for; and if he depart without any good reason he will be liable to an action for so doing. Where, therefore, B. covenanted to serve A. as a journeyman for five years and to work at the usual hours daily, under a penalty of 100*l.*, but before the expiration of the five years departed out of the service, A. recovered against him in an action of debt the full sum of 100*l.* and costs.(*d*) In this case, also, it would be equally necessary to prove a legally binding contract of hiring aad service.(*c*)

The duties of the servant to his master *during his service* must, generally speaking, depend in a great measure upon the nature of his employment, his master's business, and the contract he has entered into with his master. *There are, however, many duties which are implied by law from the relationship of master and servant, and are binding upon all servants. Thus every servant is bound to obey all the lawful orders of his master,(*e*) and to be honest(*f*) and diligent(*g*) in his master's business. "Further, as in this contract the condition of the master is more advantageous than that of the servant, the servant ought to respect his master according to his station in the world."(*h*) [*65]

Every servant, moreover, is bound to take due and proper care of his master's property entrusted to him; and if guilty of *gross negligence*, whereby his master's property is injured, he will be liable to an action; but he is not obliged to preserve his master's property at all adventures.(*i*)(1) In an old case, therefore,(*k*) where a carrier brought an action against his servant for losing goods: it was held, that the action would not lie; Holt, C. J., saying, that "there ought to be a negligence shewn in the servant to make him liable to this action, for this amounts only to a bailment of goods, where if thieves break in and steal them he shall not answer it."

And if guilty of fraud or misfeasance he would also be liable to an action at the suit of his master. Thus, where(*l*) the plaintiff covenanted with J. S. not to import certain goods, and the defendant, being the

(*b*) Richards v. Hayward, 2 M. & G. 574.
(*c*) See the preceding chapter as to the requisites of the contract.
(*d*) Bird v. Randall, 3 Burr. 1345; and see Huttman v. Boulnois, 2 C. & P. 513; Lees v. Whitcomb, 5 Bing. 34.
(*e*) Post, p. 70. (*f*) Post, p. 72, and post, ch. 8.
(*g*) Post, p. 73. (*h*) Puff. de Off. Hom. act Civ. lib. 2, cap. 4. § 2.
(*i*) Bac. Ab. tit. "Master and Servant," M. 1; and see 1 Smith's L. C. 986, 999; Nickson v. Brohan, 10 Mod. 109.
(*k*) Savage v. Walthew, 11 Mod. 135. (*l*) Hussy v. Pacy, 1 Lev. 188.

(1) See Hathaway v. Smith, 2 Tyler's Rep. 348.

plaintiff's servant and knowing thereof, imported the said goods, whereby the plaintiff broke his covenant and was sued by J. S., who recovered damages against him: it was held, that the servant was bound to indemnify his master, although it was not alleged that the servant imported the goods *with intent* to damnify his master. And where(*m*) a merchant, on going abroad, trusted his servant to receive in his absence all goods that should arrive for him, and to pay the duties upon them, but the servant landed some without paying the duties, whereby they became forfeited to, and were seized on behalf of, *the Queen, it was held [*66] that the merchant might maintain an action on the case against the servant for this malfeasance. And so it is said, that if a servant, that drives his master's cart, by his negligence suffers the cattle to perish, an action upon the case lies against him.(*n*) And if a man deliver a horse to his servant to go to market, or a bag of money to carry to London, which he neglects to do, the master may have an action of account or detinue against him.(*o*)

And a servant who induces an apprentice to leave his master's service, is liable to an action for so doing.(*p*)

A master, however, cannot maintain an action against a servant for soliciting business from his (master's) customers for himself when his service is at an end, and he sets up on his own account.(*q*) But it would seem that if a servant should endeavor to induce his master's customers to leave him, and transfer their business to the servant, whilst the relationship of master and servant subsisted, such conduct would render the servant liable to an action at the suit of the master.(*r*)

A servant is also liable to an action at the suit of his master, where a third person has brought an action, and recovered damages, against the master, for injuries sustained in consequence of the servant's negligence or misconduct; and in such action against the servant, the verdict against the master, in the action brought against *him*, is evidence as to the quantum of damages, though not as to the fact of the injury.(*s*)(1) Upon this ground, formerly,(*t*) the servant through whose negligence or misconduct an injury was caused, was inadmissible as a witness for his master, in an action brought against *him*, for such injury, without a release.(*u*)

But in one case, a very strong opinion was expressed, (though it *became unnecessary to *decide* the question,) that the proprietor [*67] of a newspaper, who has been convicted upon a criminal infor-

(*m*) Lewson v. Kirk, Cro. Jac. 265.
(*n*) 7 H. 4, 14; Bac. Abr. tit. "Master and Servant," M.
(*o*) 21 H. 4, 14; Bac. Abr. tit. "Master and Servant," M.
(*p*) Turner v. Robinson, 5 B. & Ad. 789; and see Grot. lib. 3, cap. 7, § VI. 5.
(*q*) Nichols v. Martin, 2 Esp. 732. (*r*) Ibid.
(*s*) Green v. The New River Company, 4 T. R. 589; Pritchard v. Hitchcock, 6 M. & G. 165.
(*t*) See now 3 & 4 Wm. 4, c. 42, and Yeomans v. Legh, 2 M. & W. 419.
(*u*) Green v. The New River Company, ubi supra; Whitamore v. Waterhouse, 4 C. & P. 383, and cases collected, 1 Phil. on Ev. 101; 2 Smith's L. C. 52, note to Bent v. Baker.

(1) See Reeve's Dom. Relations, p. 370 and note to 2d ed. by Chittenden, 1846.

mation, and fined for the publication of a libel in the paper, inserted, without his knowledge or consent, by the editor, cannot recover, in an action against the editor, the damages he has sustained by such conviction.(*v*)

Where a servant or other agent has received money or goods from or on account of his master or principal, he is, generally speaking, accountable to him, and him only, for them, as he is considered to be estopped from setting up the title of any other person, or asserting the jus tertii, as it is sometimes expressed, in opposition to the title of his master or principal.(*w*) And so in equity, an agent to receive for the use of his principal cannot by mere notice be converted into a trustee for a third person;(*x*) and an agent employed by a trustee is accountable to him only, and not to the cestui que trust.(*y*) Upon similar principles a sub-agent is accountable to the superior agent, by whom he was employed, and not to the principal.(*z*) The above mentioned estoppel, however, does not operate where the title of the master or principal accrued fraudulently or tortiously;(*a*) or under a defeasible contract, which has actually been defeated:(*b*) *and in such cases the servant or agent has been allowed to set up the jus tertii, in opposition to the claim of his master or principal.(*c*) The question as to how far a servant may rely upon his accountability to his master, and the maxim, respondeat superior, in opposition to the claims of third parties, will be treated of in a subsequent Chapter.(*d*) The cases, however, in which *that* question arose must be carefully distinguished from those in which the action is brought by the master; as a third person who has a good title to goods, may, in general, recover them from the servant, notwithstanding the bailment.(*e*) [*68]

Where a servant is in the habit of receiving money for the use of his master, and, by the established course of dealing, pays it over to his master from time to time, without any written vouchers passing between

(*v*) Colburn v. Patmore, 1 Cr., M. & R. 73. See the note at the end of the case; and see also Campbell v. Campbell, 7 Cl. & Fin. 181; 1 Smith's L. C., note to Lampleigh v. Braithwait; Shackell v. Rozier, 2 Bing. N. C. 634. The question, however, could hardly arise, since the stat. 6 & 7 Vict. c. 96, s. 7, vide post, ch. 5.

(*w*) Dixon v. Hamond, 2 B. & Ald. 310; Roberts v. Ogilby, 9 Price, 269; Gosling v. Birnie, 7 Bing. 339; White v. Bartlett, 9 Bing. 378; Holl v. Griffin, 10 Bing. 246; Sims v. Britain, 4 B. & Ad. 375; Kieran v. Sanders, 6 A. & E. 515; Ireland v. Thompson, 4 C. B. 171. See Story on Ag. § 217; Smith's Merc. Law, 107.

(*x*) Nicholson v. Knowles, 5 Madd. 47. See Crawshay v. Thornton, 2 Myl. & Cr. 1; Stuart v. Welch, 4 Myl. & Cr. 323; Fyler v. Fyler, 3 Beav. 558.

(*y*) Myler v. Fitzpatrick, 6 Madd. 360.

(*z*) Cartwright v. Hately, 1 Ves. 292; Pinto v. Santos, 3 Taunt. 447; Sims v. Britain, 4 B. & Ad. 325; Baron v. Husband, 4 B. & Ad. 611; Ireland v. Thompson, 4 C. B. 171; Cobb v. Becke, 6 Q. B. 930; Robbins v. Fennell, 11 Q. B. 248.

(*a*) Hardman v. Wilcock, 9 Bing. 382, note; Cheeseman v. Exall, 6 Exc. 341.

(*b*) Murray v. Mann, 2 Exc. 538.

(*c*) When he can set up the jus tertii, he must of course show a *complete* title in such third person; Crosskey v. Mills, 1 Cr., M. & R. 298. If it has not been asserted, or has been abandoned, by such third person, the servant or agent cannot rely upon it; Betteley v. Reed, 4 Q. B. 511; White v. Mullett, 6 Exc. 713. In trover, the jus tertii may be given in evidence under a plea "not possessed;" Leake v. Loveday, 4 M. & G. 972.

(*d*) Post, ch. 6.

(*e*) Ogle v. Atkinson, 5 Taunt. 759. See Cheeseman v. Exall, 6 Exc. 341.

them, then the presumption of law is that all sums so received by the servant are regularly paid over to the master. Therefore, where there has been such a course of dealing, in an action by the master against the servant for money had and received, it is not enough for the master to prove that sums have been received by the servant to his use; but the onus lies upon him to prove by positive evidence that the servant has not duly accounted with him.(*f*)

CHASTISEMENT OF SERVANT.

It is conceived, notwithstanding passages which may be found in the books *apparently* to the contrary,(*g*) *that no master(*h*) would [*69] be justified by the law of England, even in moderately chastising a hired servant of full age for dereliction of duty; and that where the books speak of a master being justified in moderately chastising his servant or apprentice, they must be taken to apply only to the case of a servant or apprentice *under age*.(*i*) And the only civil remedies(*j*) a master has for idleness, disobedience or other dereliction of duty, or breach of contract on the part of a servant, are, either to bring an action against him,(*k*) or, as Puffendorf expresses it,(*l*) "to expel the lazy drone from his family, and leave him to his own beggarly condition." And the circumstances which justify the discharge of a servant will also sometimes justify the non-payment of his wages.(1)

DISCHARGE OF SERVANT.

It is difficult to lay down any general rule as to what causes will justify the discharge of a servant(*m*), which *shall comprise and be [* 70] applicable to all cases; since whether or not a servant in any par-

(*f*) Evans v. Birch, 3 Campb. 10. See Atlee v. Backhouse, 3 M. & W. 633.

(*g*) 1 Hawkins P. C. lib. 1, cap. 29, sect. 5, cap. 60, sect. 23; 3 Salk. 47; Burn's Justice, tit. "Servant," sect. 9; Bac. Abr., tit. "Master and Ser." N.; Hale's Hist. P. C. 454. The cases of Villenage—9 Rep. 76 *a;* Anon. 2 Mod. 167—would not apply to a hired servant. See Hob. 99; F. N. B. 168 P., and Puff. de Off. Hom. ac Civ. lib. 2, cap. 4, sect. 2, and M. Barbeyrac's note to Puff. Law of Nature and Nations, B. 6, cap. 3, sect. 4, note (1), and Grot. lib. 2, cap. 26, sec. 3.

(*h*) The master of a ship however has, by law, authority, in case of disobedience or disorderly conduct, to correct the mariners in a reasonable manner. See Abbott on Shipping, Part 2, Ch. 4, s. 4. The case of mariners on board ship seems to be exceptional, but it is not confined to cases where the vessel is at sea; Lamb v. Burnett, 1 Cr. & J. 291.

(*i*) 1 Bl. Comm. 428; 2 Kent's Comm. 211; F. N. B. 168, lib. 2, where it is said that battery of a servant is a good cause of departure. In pleading a justification of *moderate correction* of an apprentice it is not usual to state that he was under age; 3 Ch. Pl. 321.

(*j*) See post, ch. 8 & 9 as to criminal proceedings.

(*k*) F. N. B. 167; Dalt. Just. c. 58.

(*l*) Puff. on the Law of Nature and Nations, b. 6, ch. 3, sect. 4.

(*m*) Apprentices with whom a premium is given, and who are bound by indenture, cannot be discharged for misconduct; the only remedy of the master (where correction fails) being by action on the covenants in the indenture; Winstone v. Linn, 1 B. & C. 460; Wise v. Wilson, 1 Carr. & K. 662. But it would seem to be otherwise where the apprentice is entitled to a salary. See Mercer v. Whall, 5 Q. B. 447.

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(1) See 2 Kent's Com. 261 and notes. Com. v Baird, 1 Ashm. R. 267.

ticular case was rightfully discharged, must, of course, often depend upon the nature of the services which he was engaged to perform, and the terms of his engagement. It is conceived, however, that the following rules, which may be stated as the result of the decisions upon the subject, are applicable to *most* cases :(1)

I. That wilful disobedience on the part of the servant of any lawful order of his master is a good cause of discharge.

II. Gross moral misconduct, whether pecuniary or otherwise, will justify the discharge of a servant.

III. Habitual negligence in business, or conduct calculated seriously to injure his master's business, will justify the discharge of a servant.

I. Wilful disobedience on the part of the servant of any lawful order of his master, is a good cause of discharge.(*n*)

Thus where the yearly servant to a farmer,(*o*) who usually breakfasted at five, A. M., and dined at two, one day refused to go with the horses to the Marsh, which was a mile off, before dinner—dinner being then ready, saying that he had done his due, and would not go till he had had his dinner; whereupon his master told him to go about his business, and he went accordingly, without offering to obey his master's orders: Lord Ellenborough held, that the master was justified in dismissing him.

So where the plaintiff, (*p*) who had agreed with the defendant (under stat. 5 & 6 Wm. 4, c. 19, ss. 2, 3,) to serve as carpenter's mate of a vessel during a South Sea voyage, during the voyage mutinously refused to work the ship except to an English port, whereupon he was put on shore at Java and discharged, the defendant was held to be justified in discharging him.

*Again in the case of Turner v. Mason,(*q*) it was held that the defendant was justified in dismissing the plaintiff, a housemaid, who persisted in leaving his house contrary to his orders, although she went to visit a sick and dying mother: Parke, B. saying it was laid down by Lord Ellenborough in Spain v. Arnott,(*r*) and by me in Callo v. Brouncker,(*s*) and confirmed by the Court of Queen's Bench in Amor v. Fearon,(*t*) that the wilful disobedience of any lawful order of the master is a good cause of discharge. Here the plea discloses a perfectly lawful order, namely, that the defendant should not absent herself from the service during the night, and plaintiff's disobedience thereto.(2) Then the question is, whether the replication discloses sufficient ground of excuse for [* 71]

(*n*) As to the proper mode of pleading a discharge for disobedience of lawful orders, see, in addition to the cases mentioned in the text, Powell v. Bradbury, 7 C. B. 201; Lush v. Russell, 5 Exc. 203; S. C. 1 L. M. & P. 369.

(*o*) Spain v. Arnott, 2 Stark. 256; Callo v. Brouncker, 4 C. & P. 518; (see Fischer v. Aide, 3 M. & W. 486;) Amor v. Fearon, 9 A. & E. 548.

(*p*) Renno v. Bennett, 3 Q. B. 768. (*q*) M. & W. 112; S. C 2 D. & L. 890.

(*r*) 2 Stark. 256. See this case, ante p. 70. (*s*) C. & P. 518.

(*t*) 9 A. & E. 458. See this case, post, p. 74.

(1) Any misconduct inconsistent with the relation is good ground for discharge. Singer v. McCormick, 4 W. & S. 265.

(2) See Francis v. Lewis, 11 Conn. 200.

such disobedience. Primâ facie, the master is to regulate the times when his servant is to go out from and return to his house. Even if the replication shewed that he had notice of the cause of her request to absent herself, I do not think it would be sufficient to justify her in disobedience to his order; there is not any imperative obligation on a daughter to visit her mother under such circumstances, although it may be unkind and uncharitable not to permit her. But the replication states nothing to shew that the defendant had any notice or knowledge of the mother's illness."

And similar principles were laid down in the recent case of Lilly v. Elwin.(*u*) In that case the plaintiff was engaged as a wagoner to the defendant, but during the harvest worked in the field generally. The practice was, during harvest, to work till eight o'clock in the evening. The plaintiff refused to work till that hour,—not as being an unreasonable hour, or as not being within the terms of his contract, but because strong beer of good quality was not allowed to him, according to a custom which he alleged to exist, but could not prove, the beer supplied being, as he contended, very bad small beer, not so good as water; whereupon the defendant refused any longer to employ the plaintiff, and took him before a magistrate, who discharged him, and he brought his action against the defendant. But it was held, that the defendant had a right to discharge him, and must [* 72] *be taken to have exercised that right by ordering him not to return, taking him before a magistrate, and acquiescing in the magistrate's order of discharge.

However, where the plea to an action for wrongful dismissal sets up, as an excuse, *disobedience* of orders *causing loss*, it is not sufficient to shew disobedience which did not occasion a loss.(*v*)(1) And a mere obstinate refusal to work will not, of itself, justify the dismissal of a servant, as it might be an obstinate refusal to do an unlawful act (*e. g.* to work at trade on Sunday.)(*w*)

II.—Gross moral misconduct, whether pecuniary or otherwise,(*x*) will justify the discharge of a servant.

Thus, if a servant robs his master, he may although a month's notice is required, dismiss him without any notice, and need not pay him any wages.(*y*) And if a servant habitually embezzles his master's property, the amount embezzled is wholly immaterial; and although the arrears of wages sought to be recovered may exceed the amount embezzled, the servant is not entitled to anything.(*z*) And where(*a*) the accountant to a company received money for which he did not account, and falsified the accounts furnished by him, his employers were held justified in dismissing him, although they did not assign that as the cause of his dismissal.

(*u*) 11 Q. B. 742, 756.

(*v*) Cussons v. Skinner, 11 M. & W. 161. (*w*) Jacquot v. Bourra, 7 Dowl. 348.

(*x*) Callo v. Brouncker, 4 C. & P. 518. See Burgess v. Beaumont, 7 M. & W. 962, where a plea imputing general immorality and dishonesty to a governess, was held too vague and uncertain, and a demurrer on that ground was allowed.

(*y*) Per Park, J., in Cunningham v. Fonblanque, 6 C. & P. 49. See Trotman v. Dunn, 4 Campb. 211.

(*z*) Brown v. Croft, 6 C. & P. 16, note; and see Spotswood v. Barrow, 5 Exc. 110.

(*a*) Baillie v. Kell, 4 Bing. N. C. 638.

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(1) Still v. Hall, 20 Wend. R. 51.

Upon similar principles it has been held, that a clerk and traveller, at 80*l.* a year, who lived and boarded in his master's house, was rightfully dismissed for assulting his employer's maid servant with intent to ravish her.(*b*) And it is said that a maid servant being with child,(*c*) or a man servant being the father of a bastard child,(*d*) is a good cause of discharge.

*III.—Habitual negligence in business, or conduct calculated seriously to injure his master's business, will justify the discharge of a servant. [*73]

Thus in one case,(*e*) Parke, B. said, "that for habitual neglect the defendant was at liberty to part with the plaintiff." And in another,(*f*) Park, J., observed: "If a servant is negligent in his business, and injures his master, I am not prepared to say that the master may not dismiss him; if he were kept it might be very injurious, as he might do the business very carelessly when he knew he was not to be kept any longer." Upon these principles, the foreman to silk manufacturers was held to be rightly discharged (and moreover liable to an action) for advising and assisting an apprentice to quit the service and go to America.(*g*) And the clerk to a company was held to be rightly dismissed for entering in a minute book a protest in his own handwriting, against a resolution of the directors calling a meeting to appoint his successor, as such an act was inconsistent with his service.(*h*)

So in an action(*i*) by the acting manager of Covent Garden Theatre for wrongful dismissal from his situation, &c.; to which, amongst other pleas, the defendant pleaded that the plaintiff's conduct was calculated to prejudice the interests of the theatre; Vaughan, J., said, "It is a question of fact whether the plaintiff was so conducting himself as that it would have been injurious to the interests of the theatre to have kept him.(*k*). If he was, I should have no difficulty in saying that it would be good ground of dismissal."

Again, where(*l*) the defendant, a master builder, dismissed the plaintiff a journeyman carpenter, for poaching on the premises of Mr. T., a gentleman for whom the defendant was working, and at whose premises the plaintiff was engaged working; Coleridge, J., in leaving the question to the jury, whether or no this was just ground for dismissal, said: "In dealing with this question I *think that you ought to consider what Mr. T. had a right to expect from the defendant and [*74] his men. If a gentleman engages a tradesman, who has several workmen under him, he has a right to expect that the workmen will conduct themselves well." "It is said they did no damage; but I do not think

(*b*) Atkin v. Acton, 4 C. & P. 208.
(*c*) Cald. 11. (*d*) Rex v. Welford, Cald. 57.
(*e*) Callo v. Brouncker, 4 C. & P. 518, supra, p. 72.
(*f*) Cunningham v. Fonblanque, 6 C. & P. 44.
(*g*) Turner v. Robinson, 5 B. & Ad. 789.
(*h*) Ridgway v. The Hungerford Market Company, 3 A. & E. 171.
(*i*) Lacy v. Osbaldiston, 8 C. & P. 80.
(*k*) And see The East Anglian Railway Company v. Lythgoe, 2 L. M. & P. 221.
(*l*) Read v. Dunsmore, 9 C. & P. 588.

that it entirely depends on that, because it might have been that Mr. T. might have said I will not allow the workmen to go into my garden, and if they had done so, they would have done no actual damage; but still if the defendant employed persons who acted in that way he would soon find that he was injured in his business, and would lose his custom because gentlemen would not engage him."

So a wine-merchant(*m*) was held justified in dismissing a clerk at a yearly salary, who also, at certain periods, received a portion of the profits (but this, as the master alleged, was a mere gratuity), for claiming to be a partner, as he thereby disclaimed being a servant.

And it was said by Lord Abinger,(*n*) that the accepting of an undrawn bill of exchange, in blank, by the manager of a cotton company, was wrong, and would have been a very justifiable cause of discharging him the next day after it was discovered.(*o*)

But it has been held,(*p*) that a schoolmaster was not justified in discharging the plaintiff, a teacher of French and drawing, for not returning to the school for two days after the vacation, as it did not appear that the plaintiff had been guilty of any immorality, nor that the defendant was obliged to hire another person, or that the plaintiff's department was not, in fact, adequately filled, nor that the instructions in French or drawing were impeded, *or that the business of the school was suspended for a single hour. [* 75]

And where(*q*) a surgeon, by a written agreement not under seal, agreed with the plaintiff, in consideration of a premium of 50*l.*, to take her son a young man seventeen years old, as pupil and assistant for three years, to assist him in his studies, to allow him to attend lectures, and to provide him with board and lodging; but dismissed him in consequence of his coming home drunk about five times, and on some occasions when he came home late desiring the shop-boy to make up the medicines; Lord Denman, summing up to the jury, said: "There is a great distinction between a contract of apprenticeship and a contract with a servant. A person has a right to dismiss a servant for misconduct, but has no right to turn away an apprentice because he misbehaves. This is a mixed case something between that of apprenticeship and service. The plaintiff's son goes to the defendant to render assistance to him in his business, although he is also to pursue his studies; and as a justification of his dismissal the defendant has pleaded, not that the plaintiff's son did not perform all things on his part to be performed, but that he did things injurious to the defendant's practice, and so misconducted himself as to be dangerous to the defendant's practice as a surgeon. It is proved, beyond

(*m*) Amor v. Fearon, 9 A. & E. 548; and see Mercer v. Whall, 5 Q. B. 447, where to an action of covenant by an articled clerk against a solicitor for dismissing him, the defendant pleaded that the plaintiff conspired to induce the defendant's clients to leave him, and disclosed his professional secrets.

(*n*) Cussons v. Skinner, 11 M. & W. 170. The decision in that case, however, did not turn on this point.

(*o*) And see The East Anglian Railway Company v. Lythgoe, 2 L. M. & P. 221, where a clerk to a railway company was dismissed for disclosing the accounts of the railway to another company, but under the circumstances of the case the County Court Judge thought him entitled to his salary up to his discharge.

(*p*) Filleul v. Armstrong, 7 A. & E. 557.

(*q*) Wise v. Wilson, 1 Carr. & K. 662.

all doubt, that on some occasions the plaintiff's son came to the defendant's house intoxicated: but I think that alone would not justify the defendant in dismissing him. It is also proved that, on several occasions, in consequence of the plaintiff's son coming home late, he could not compound the medicines, and employed the shop-boy to do it. Now I think this affords matter for serious consideration; *and if you think that from this conduct of the plaintiff's son, real danger was occasioned to his master's business,* you ought to find your verdict for the defendant, *as the defendant was then, in my opinion, justified in dismissing him.*" But the plaintiff had a verdict.

And where(*p*)the plaintiff was engaged as clerk to the defendant, under a contract of hiring for two years, to conduct the business of a shipping agent at Southampton, and in the course of his employ it was his duty to pay freight, dock dues, &c., to meet which the defendant *remitted money: on one occasion the plaintiff wrote to the defendant [* 76] for 140*l.*, enclosing an account of the purposes for which it was required, one of them being the payment of 30*l.* salary due to himself: ten days afterwards, the defendant sent the plaintiff 100*l.*, in a letter directing him to apply the money for "business purposes," and he applied 30*l.* in payment of his own salary; whereupon the defendant discharged him, and the plaintiff brought his action for wrongful discharge: at the trial, the Judge left it to the jury to say whether the plaintiff had been guilty of any wrongful and improper appropriation of the money, or of disobedience of orders: and it was held by the Court of Common Pleas to have been properly so left, and that the Judge was not bound to tell the jury that it was not necessary to justify the dismissal of the plaintiff that he should have been guilty of any moral turpitude.

Where an act of wilful disobedience of a lawful order, or other misconduct on the part of a servant which would justify his master in discharging him is known to the master at the time he discharges him, although he does not insist on that as the precise ground of discharge; or even if he alleges some other ground of discharge; yet the master may afterwards, by shewing that the fact existed and that he knew it, justify such discharge on that ground.(*q*) But it would seem that if the master at the time he discharged the servant, did *not know* of any act of misconduct on the part of the servant which would justify his discharge, although such fact existed, the mere existence of the fact would not justify the discharge.(*r*)

In a case, however, in which a traveller and salesman brought an action for wrongful dismissal, and the defendant pleaded in justification that the plaintiff had received money from the defendant's customers and embezzled it, wherefore he discharged him; to which the plaintiff replied de injuria; and it appeared in evidence that the defendant did not know of the embezzlement when he discharged the plaintiff: It was held, that *on these pleadings,* the Judge who tried the case was *wrong [* 77]

(*p*) Smith v. Thompson, 8 C. B. 44.

(*q*) Baillie v. Kell, 4 Bing. N. C. 638; Ridgway v. Hungerford Market Company, 3 A. & E. 171; Cussons v. Skinner, 11 M. & W. 161; Mercer v. Whall, 5 Q. B. 447.

(*r*) Cussons v. Skinner, ubi supra.

in leaving it to the jury to say whether the defendant discharged the plaintiff for that cause, as the defendant's motive was not in issue.(s)

Secondly.—As between the Master and Third Persons.

A master may maintain an action against any person who deprives him of the services of his servant, either by enticing him away from his master;(t)(1) or by harbouring and detaining him after having been apprised of the former contract;(u) or by beating, confining, or disabling him; or by seducing a female servant.(v) The master may also, where wages have been earned by a servant enticed away or harboured by another person, waive his right of action for such tortious act, and sue for the earnings of his servant. In all these cases the master's right of action arises out of the property which he has acquired by the contract of hiring, in the labour of his servant; and in all of them, except the action for his servant's earnings, the gist of the action is the loss of service, without an allegation of which no action can be sustained by a master, however great the injury to his servant.(w) Whilst, therefore, on the one hand, a mere attempt to deprive a master of the services of his servant, without any damage following upon it, would not give the master a right of action;(x) so, on the other, a master, who has recovered, in an action against the servant, a stipulated penalty for leaving his service, cannot maintain an action against the person who induced him to leave.(y) [* 78] Moreover, the loss of sevice must *be the natural and necessary consequence of the defendant's act, otherwise the master cannot maintain any action. Where, therefore, the plaintiff, who was director of certain oratorios had, at considerable expense, engaged M., who, in consequence of a libel published by the defendant, refused to sing, being afraid of being hissed; Lord Kenyon held that the plaintiff could not maintain an action against the defendant, as the injury complained of was too remote and impossible to be connected with the cause assigned for it.(z)

OF THE ACTION FOR ENTICING AWAY A SERVANT.(2)

An indictment will not lie for enticing an apprentice or servant from his master, it being only a private injury which may be redressed by civil

(s) Spotswood v. Barrow, 5 Exe. 110.
(t) F. N. B. 71, 1., 167, B. (u) F. N. B. 168; Winch, 51.
(v) Com. Dig., tit. "Trespass," B. 5; tit. "Pleader," 3 M. 11.
(w) Robert Mary's case, 9 Rep. 113 a; Poley v. Osborn, cited 10 Rep. 130 b; Hanbury v. Ireland, Cro. Jac. 618; Chamberlaine v. Harvey, 5 Mod. 182; S. C. 1 Ld. Raym. 146; Hall v. Hollander, 4 B. & C. 660; Grinnell v. Wells, 7 M. & G. 1033; S. C. 2 D. & L. 610; Eager v. Grimwood, 1 Exe. 61; Davis v. Williams, 10 Q. B. 725. That the allegation of service under a per quod servitium amisit is sufficient on general demurrer. See 4 D. & L. 258.
(x) Per Lord Mansfield in Bird v. Randal, 3 Burr. 1352.
(y) Bird v. Randal, ubi supra.
(z) Ashley v. Harrison, 1 Esp. 48; that was an action for libel; and see Taylor v. Neri, 3 Esp. 386.

(1) See Seidmore v. Smith, 13 Johns, 322; Dubois v. Allen, Anthon's Rep. 94; Woodward v. Washburn, 3 Denio R. 369.
(2) See St. Clair v. Jones, Add. Penn. Rep. 343; Com. v. Beck, 1 Browne, Pa. Rep. 277.

action.(*a*) If therefore, one take away my apprentice or servant by force an action of trespass will lie;(*b*) but if he merely entice him to leave, and he do leave, an action on the case is the proper remedy.(*c*) A mere attempt to entice a servant away, without any damage following, would not, however, entitle the master to maintain an action.(*d*) But it is no objection to such an action, that the servant was only a journeymen who worked by the piece, if he were the plaintiff's servant.(*e*) A man, however, who lived in his own house and took in work for different people, could scarcely be called the journeyman of any particular master.(*f*) To support this action it is necessary to prove that the defendant *knew* the person to be the plaintiff's servant;(*g*) but not to particularize *the means of enticement.(*h*) There must also be a binding [*79] contract of service between the servant and his first master or the plaintiff will fail;(*i*) unless, perhaps, in the case of interruption of an actual subsisting service.(*k*) But the mere circumstance that the servant is an infant, and the contract therefore voidable, will not defeat the action.(*l*) This action will not lie after the master has recovered from the servant a stipulated penalty for leaving his service.(*m*) Nor for inducing a servant to leave his master's service at the expiration of the time for which he was hired, although the servant had otherwise no intention of leaving his master.(*n*)

OF THE ACTION FOR HARBOURING A SERVANT.

Where a person, *after notice*, continues to employ another man's servant, that other may maintain an action against him, although at the time he hired him, the second master did not know that he was hiring another man's servant; and, therefore, no action would lie for enticing him away.(*o*) Thus, where(*p*) one Hobbs, who was retained by the plaintiff, a currier, to work by the piece, left the plaintiff's service on a dispute between them, and at the time of departure had some work in hand; he then applied for work to the defendant, who was also a currier, and who employed him, not knowing of his engagement with the plaintiff. A few days afterwards the defendant having been apprised, by the plaintiff, that

(*a*) Reg. v. Daniel, 6 Mod. 99, 182; S. C. 1 Salk. 380; S. C. 2 Ld. Raym. 1116; Com. Dig. tit. "Indictment," G. 3. See 5 Geo. 4, c. 97, which repealed various statutes for preventing the seducing and enticing artificers and workman to leave their employ and go to foreign parts.

(*b*) Reg. v. Daniel, ubi supra; Reavely v. Mainwaring, 3 Burr. 1306.

(*c*) Reg. v. Daniel, ubi supra. See Hambleton v. Veere, 2 Wms. Saund. 170.

(*d*) Bird v. Randal, 3 Burr. 1352.

(*e*) Hart v. Aldridge, Cowp. 54; Blake v. Lanyon, 6 T. R. 221.

(*f*) Hart v. Aldridge, Cowp. 54.

(*g*) Fores v. Wilson, Peake, 55.

(*h*) Winsmore v. Greenbank, Willes, 582.

(*i*) Sykes v. Dixon, 9 A. & E. 693; and see Gye v. Felton, 4 Taunt. 876; Pilkington v. Scott, 15 M. & W. 657; Hartley v. Cummings, 5 C. B. 247.

(*k*) See Lord Denman in Sykes v. Dixon, ubi supra, and per Maule, J., in Hartley v. Cummings, ubi supra; and see Y. B. 22 H. 6, 30; Barber v. Dennis, 6 Mod. 69; Keane v. Boycott, 2 H. Bl. 511.

(*l*) Keane v. Boycott, ubi supra; and see 7 T. R. 310, 314.

(*m*) Bird v. Randal, 3 Burr. 1345.

(*n*) Nichol v. Martin, 2 Esp. 734.

(*o*) Fawcet v. Beavres, 2 Lev. 63.

(*p*) Blake v. Lanyon, 6 T. R. 221.

Hobbs was his servant and had left his work unfinished, and being threatened with an action in case he continued to employ Hobbs, requested the servant to *return to his former master and finish his work. This [*80] Hobbs refused to do, and the defendant continued him in his service; whereupon the plaintiff brought his action for enticing Hobbs away, and harbouring him after notice. No evidence was given in supported of the charge of enticing away, and it was contended on the part of the defendant, that no action could be maintained for continuing to employ Hobbs after notice, as, at the time the defendant engaged him, he did not know he was the plaintiff's servant, but the objection was overruled. And per Curiam, an action will lie for receiving or continuing to employ the servant of another after notice, without enticing him away.

This cause of action, however, is generally joined with that for enticing away a servant; and the observations on that form of action apply to this also.

The action for harbouring the plaintiff's servants will not lie against the captain of an English ship to which the plaintiff's slaves had escaped; for refusing to give them up to the plaintiff.(*q*)

OF THE ACTION BY A MASTER FOR THE EARNINGS OF HIS SERVANT.(1)

A master deprived of the services of an apprentice or servant, who has been enticed away and harboured by another master, is not confined to an action for damages for the injury he has sustained by the loss of his servant. He may in some cases waive the tort, and bring an action to recover the wages due to his apprentice or servant from such second master; the maxim in such cases being, "Quicquid acquiritur servo, acquiritur domino."(*r*) This rule of law had formerly a much more extensive signification than it now has; for during the existence of villenage, whatever was acquired by the *vilein, whether realty or personalty, [*81] became the property of his lord under certain qualifications.(*s*) But, even now, the rule holds in some degree with respect to apprentices and servants, though with a great difference in point of extent and application; for the relation of an apprentice and servant to the master is more mild and limited than that of a vilein to his lord, and only imports, that the master shall be entitled to their personal labour during the time stipulated, either in a particular way, or generally according to the nature of the apprenticeship or service. Consequently, the master cannot claim any other acquisitions than such as are the result of that labour.(*t*)

(*q*) Forbes v. Cochrane, 2 B. & C. 448. See Smith v. Gould, 2 Salk. 667, as explained by Hargrave in his argument in Sommerset's case, 20 How. St. Tr. 65, note.

(*r*) See Barrington on Stat. 276; Co. Litt. 117 a, note (1); Peake's Add. Cas. 121, note; Story on Ag. 421; Paley on Ag. 339; Grot. lib. 3, cap. vii., sect. iv., 2. The French maxim was, "Qui a le vilain, il a sa proye," vide 20 How. St. Tr. 36, note.

(*s*) Litt. sects. 177, 194; Co. Litt. 123 b; and see the form of enfranchisement of a vilein given in Barr. on Stat. 279.

(*t*) See Shanley v. Hervey, cited in Somerset's case, 20 How. St. Tr. 55.

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(1) See Demyer v. Souzer, 6 Wend. Rep. 436; Damon v. Osburn, 1 Pick. R. 476—481.

What the apprentice or servant earns by his labour, whilst he remains with the master, or is actually working for him, falls so clearly within this principle that there can be no room for doubt. Nor can there be any where the apprentice or servant is employed by another person with the knowledge and consent of the master, without any circumstances indicating a waiver of their earnings. Most of the cases upon this subject relate to apprentices in a seafaring way, whose wages and prize-money,(*u*) as seamen, though earned whilst in another service, have been recovered by those to whom they were bound. But the principle which governs them seems to apply to apprentices and servants in general, and has, indeed, been extended so far as to give the master a right to the wages or earnings, whether the service is performed by the apprentice with or without the master's license, and even though the earnings accrue in a trade or service different from that to which the apprentice is bound.(*v*)

Thus, where(*w*) the defendant seduced an apprentice *from on board the plaintiff's ship, in Jamaica, and employed him as a mariner to assist in navigating his own ship home, the plaintiff brought an action for the wages earned by his apprentice, and recovered. [*82]

And payment to the master has been held to be an answer to an action by the apprentice for wages.(*x*) And where(*y*) the captain of a ship let the ship to the government at forty shillings per ton per month, to be paid to the owner, and an additional shilling per ton per month to be paid to himself for his services, but the whole earnings (including the shilling per ton) were paid to the owner: It was held, that the captain could not maintain an action against the owner to recover the shilling per ton agreed to be paid to the captain.

One advantage attending this form of action is, that it may be brought after the death of the tortfeazor, which is not the case with an action framed on the tort;(*z*) but, on the other hand, there is this objection to it, that it admits of a set-off and deductions, which would not be allowed in the other form of action.(*a*) That, accordingly, is the more usual remedy, and in it the jury may, if the circumstances justify their so doing, give the plaintiff greater damages than the mere wages of the servant would amount to.

It appears to be an exception to the rule that a master is entitled to the profits resulting from his servant's labour; that if a servant make an invention whilst in the employ of a master, the invention belongs to the servant, and the master cannot take out a patent for it. Though it is

(*u*) See Carsan v. Watts, 3 Doug. 350, where the master was held not to be entitled to prize money, the usage being for the apprentice to have it; Hill v. Allen, 1 Ves. Sen. 83.

(*v*) Co. Litt. 117 a, note (1); Barber v. Dennis, 6 Mod. 69; S. C. 1 Salk. 68. The case of Eades v. Vandeput, 5 East, 39, does not appear to be of much authority for the reasons given in Foster v. Stewart, 3 M. & S. 191.

(*w*) Lightly v. Clouston, 1 Taunt. 112; and see Forster v. Stewart, 3 M. & S. 191; Neate v. Harding, 6 Exc. 349.

(*x*) Bright v. Lucas, Peake's Add. Cas. 121. See the note at the end of this case.

(*y*) Thompson v. Havelock, 1 Camp. 527.

(*z*) Per Bayley, J., in Foster v. Stewart, 3 M. & S. 191.

(*a*) Per Heath, J., in Lightly v. Clouston, 1 Taunt. 112.

said to be otherwise where the servant is employed for the express purpose of inventing.(*b*)

[*83] *OF THE ACTION BY A MASTER FOR PERSONAL INJURIES TO HIS SERVANT.

Numerous instances are to be found in the books of actions by masters for personal injuries to their servants; whether caused by an actual battery,(*c*) or by negligent driving,(*d*) or by a ferocious dog;(*e*) and in one case a man recovered damages in an action against a person for negligently entrusting a loaded gun to a mulatto girl, who discharged it against the plaintiff's son and servant.(*f*) This action also depends on the loss of service,(*g*) but a service de facto is sufficient to support the action.(*h*) It is in this form of action that a parent usually proceeds to recover damages for injuries sustained by his children through the wrongful acts of the defendant, for in such cases a parent cannot recover any damages for his wounded feelings, but only for the loss of service he has sustained.(*i*) Where, therefore,(*k*) the defendant drove his carriage against the plaintiff's son, who was an infant only two years and a half [*84] old, and the plaintiff brought an action of trespass per quod *servitium amisit against the defendant; upon its being objected that the child was not competent to perform any act of service, by reason of its tender age, the plaintiff was nonsuited; and the nonsuit was afterwards held right by the court, Bayley, J., observing, "The authorities upon this point are all one way." If, however, there is a capacity to serve, very slight evidence is sufficient to support the allegation of service;(*l*) and, indeed, in modern cases, where there has been a capacity to serve, the tendency of the courts has been to infer service from residence

(*b*) Bloxam v. Elsee, 1 C. & P. 558. In that case Bayley, J., founded his observations on a previous case of one Arkwright, referred to in Hill v. Thompson, 8 Taunt. 395; though in Arkwright's case the invention appears to have been made by the servant, before the service commenced—in which case it would undoubtedly belong to the servant. But see the report in Davies' Patent Case, 61; and see Makepeace v. Jackson, 4 Taunt. 770, where it was held, that a calico-printer, having discharged his head colourman, was entitled to the book in which that servant had entered the processes for mixing colours during his service, although many of the processes were the invention of the servant. That, however, was only an action of trover for the book which the master had originally provided.

(*c*) Duel v. Harding, Str. 595.

(*d*) Hall v. Hollander, 4 B. & C. 660; Martinez v. Gerber, 3 M. & G. 88.

(*e*) Hodsoll v. Stallebrass, 11 A. & E. 301; Lewis v. Fog, Str. 944.

(*f*) Dixon v. Bell, 1 Stark. 287; S. C. 5 M. & S. 198.

(*g*) Robert Mary's case, 9 Rep. 113 b, and cases cited ante, p. 77, note (*w*); Rosiere v. Sawkins, Holt, 460.

(*h*) 11 H. 4, 2; F. N. B. 91 G., note. See Martinez v. Gerber, 3 M. & G. 88.

(*i*) Flemington v. Smithers, 2 C. & P. 292. Mark the difference in this respect between this action and that for seduction, post, p. 85. Formerly, whilst it was petit treason for a servant to kill his master, (25 Edw. 3, stat. 5, c. 2. See now 9 Geo. 4, c. 31, s. 2,) parricide was held not to be petit treason unless the child served the father or mother for wages, or meat, drink, or apparel, 3 Inst. 20.

(*k*) Hall v. Hollander, 4 B. & C. 660.

(*l*) In Dixon v. Bell, 1 Stark. 287; S. C. 5 M. & S. 198, the plaintiff recovered for an injury to his son, eight or nine years old, without proof of actual service.

with the parent without proof of actual service.(*m*) Where the child injured is of such tender age as to render it doubtful whether service could be presumed, the best way to avoid the difficulty is to sue in the name of the child: a course, against which the objection which formerly prevailed,(*n*) viz., that the adoption of it excluded the child's testimony, would not now apply.(*o*) The form of action may be either trespass or case, according as the plaintiff wishes to recover damages for the direct or consequential injury.(*p*) In trespass, counts may be added for breaking and entering the plaintiff's dwelling-house and assaulting himself, which might increase the damages.(*q*) Whereas in an action for the assault on the child merely, however atrocious it might be, the plaintiff could recover nothing unless loss of service were shewn.(*r*) It is no objection to an action on the case by the master that, under the circumstances, had the servant himself sued, he could only have sued in case for the consequential damage done to him.(*s*) Nor is it any answer to such an action that the servant himself has already recovered damages for the injury he has sustained; for the injury to the servant and that to the master are collateral, not *consequent upon each other.(*t*) If the servant die, it is said that the master must proceed by indictment, [*85] as the private injury is merged in the public.(*u*)

In this action the master may recover damages for the loss of service, not only before action brought, but afterwards, down to the time when it appears by the evidence the disability to serve may be expected to cease,(*v*) and he may also recover the amount of the surgeon's bill, although it has not been paid; but not physician's fees if not paid.(*w*)

The defendant may plead that the party injured was not the plaintiff's servant.(*x*) It seems, however, unnecessary, though perhaps safer, to do so.(*y*) He may also pay money into Court, provided the assault complained of be not of the plaintiff himself. If there be a count in the declaration for an assault on the plaintiff himself, the payment into Court should be confined to the other counts.(*z*)

(*m*) See Jones v. Brown, Peake, 233; S. C. 1 Esp. 217; Maunder v. Venn, M. & M. 323; Torrence v. Gibbins, 5 Q. B. 300.

(*n*) Duel v. Harding, Str. 595; Lewis v. Fog, ibid. 944; Cock v. Wortham, ibid. 1054; Selw. N. P. 1114.

(*o*) 14 & 15 Vict. c. 99, s. 2.

(*p*) Chamberlain v. Hazlewood, 5 M. & W. 515.

(*q*) Ditcham v. Bond, 2 M. & S. 436.

(*r*) Newton v. Holford, 6 Q. B. 927.

(*s*) Martinez v. Gerber, 3 M. & G. 88.

(*t*) Savil v. Kirby, 10 Mod. 386; Edmondson v. Machell, 2 T. R. 4.

(*u*) Bac. Abr. tit. "Mast. and Ser." O., citing 2 Roll. Abr. 568. But see Com. Dig., tit. "Trespass," B. 5, where the same passage is cited differently.

(*v*) Hodsoll v. Stallebrass, 9 C. & P. 63; S. C. 11 A. & E. 301.

(*w*) Dixon v. Bell, 1 Stark. 287.

(*x*) Torrence v. Gibbins, 5 Q. B. 297.

(*y*) Holloway v. Abell, 7 C. & P. 530; Eager v. Grimwood, 1 Exc. 61; but see Davies v. Williams, 10 Q. B. 725.

(*z*) Newton v. Holford, 6 Q. B. 921; S. C. 2 D. & L. 554.

OF THE ACTION FOR SEDUCTION.(1)

This action also depends upon the existence of the relationship of master and servant between the party bringing the action and the party seduced,(*a*) although it is the only method in which a parent, however high in rank he may be, can recover damages against the seducer of his daughter. In one respect this action is similar to that lastly treated of, viz., that as it is the invasion of the legal right of a master to the services [*86] of his servant, that gives him a right of action for assaults, *&c., committed upon his servant, so it is the invasion of the same

(*a*) Grinnell v. Wells, 7 M. & G. 1033; S. C. 2 D. & L. 610; Eager v. Grimwood, 1 Exc. 61. See Fores v. Wilson, Peake, 55.

(1) An action on the case, *per quod servitium*, will not lie by a father for the seduction of his daughter, where she is above the age of twenty-one years, and is not in his actual employment. *Aliter*, where she is under that age; Mercer v. Walmsley, 5 Har. & J. 27; Nickerson v. Stryke, 10 Johns. 115; Millar v. Thompson, 1 Wend. 447; Wilson v. Spoul, 3 Pennsyl. 49; Hewitt v. Prime, 21 Wend. 79.

But if the daughter, whether of age or under age, is seduced in her father's house, the father may maintain an action of trespass *quare clausum*, and lay the seduction and loss of service as consequential, or an action on the case, against the seducer. Mercer v. Walmsley, 5 Har. & J. 27. If she is above the age of twenty-one years, trifling acts of service are held sufficient evidence of her being his servant. Ib.; Wallace v. Clark, 2 Overt. 93; Briggs v. Evans, 5 Iredell, 16.

A daughter of the age of nineteen, with the consent of her father, went to live with her uncle, for whom she worked when she pleased, and he agreed to pay her for her work, but there was no agreement for her continuance in his house for any time. While in her uncle's house, she was seduced and got with child, and immediately afterwards returned to her father's house, where she was maintained, and the expense of her lying-in paid by him; though had not the misfortune happened to her, she had no intention of returning to her father. It was held that an action on the case was maintainable by the father against the seducer; the father not having divested himself of his power to reclaim the service of his daughter, and the relation of master and servant was presumed from his right to her services, arising from his liability to maintain and provide for her while under age. Martin v. Payne, 4 Johns. 387; Boyd v. Byrd, 8 Blackf. 113.

In an action on the case, by a father, for the seduction of his daughter, the Court refused to instruct the jury that if, upon the whole evidence, it should appear to them that the father, in the intercourse between the defendant and his daughter, who was of full age, did not act with the caution of a man of ordinary prudence, they ought to find for the defendant. Parker v. Elliott, 6 Munf. 587; Clark v. Fitch, 2 Wend. 459; Coon v. Moffat, 2 Penn. 583.

In an action for the seduction of a daughter, her character for chastity may be impeached by general reputation, but not by her reputation among a particular class of people. Drish v. Davenport, 2 Stew. 266.

In an action for the seduction of the plaintiff's daughter, evidence of a promise of marriage is inadmissible. Ib.; Gillet v. Mead, 7 Wend. 193; Foster v. Scoffield, 1 Johns. 297; Brownell v. Ewing, 5 Denio, 367; Ingersoll v. Jones, 5 Barb. 661.

But in an action for breach of promise of marriage, evidence of the seduction of the plaintiff by the defendant may be given. Com. v. Wilson, 2 Overt. 233; Whaler v. Tagman, 2 Blackf. 194; but see Bucks v. Shain, 2 Bibb, 341.

In an action by a father for the seduction of his daughter, evidence of a promise of marriage to the daughter, made either before or after the seduction, is not competent or lawful, under any circumstances or for any purpose. Kip v. Berdan, 1 Spencer, 239.

In an action to recover damages for the seduction of a daughter, proof of the condition in life and pecuniary ability of both the plaintiff and defendant is properly admitted; and the father may not only recover the damages he has sustained by the loss of service and the payment of expenses, but the jury may award him compensation for the disgrace cast upon his family and the loss of the society and comfort of his daughter. Gruble v. Margrave. 3 Scam. 372.

legal right, and no other, which gives a father a right of action against the seducer of his daughter.(*b*) But there is this important practical difference between the two actions, that in the action for assaulting, &c., a servant or child, the plaintiff cannot recover any compensation for the injury his feelings may have sustained, whilst in the action for seduction he may do so.(*c*) And this in practice is the chief object of the action for seduction, in which liberal damages are usually given, and the Courts are disinclined to grant new trials merely on the ground of excess in that respect.(*d*) The custom of allowing the jury, in ascertaining the amount of damages in this action to have regard not merely to the injury sustained by the loss of service, but also to the wounded feelings of the plaintiff, has arisen from a laudable desire to suppress the vice of seduction, against which the criminal law has not provided any punishment; though it may be fairly doubted how far it has succeeded in accomplishing the desired object.(*e*) The custom, however, has been now so long established that it can only be altered by the legislature.

There is also this distinction to be observed between this action for seduction and that for enticing away and harbouring apprentices or servants (the gist of which, also, as we have seen, is the loss of service,) that in the former it is not necessary to prove that the defendant *knew* the person seduced to be the plaintiff's servant, whilst in the latter it is necessary to do so.(*f*)

The gist of this action being loss of service, it follows that it may be brought by any one who has sustained *that loss; whether [*87] he be merely the master, and not a relative,(*g*) or the parent, brother,(*h*) or aunt(*i*) of the person seduced. And in one instance a person who had adopted a friend's daughter was allowed to bring an action for her seduction.(*k*) But the right of action for an injury of this sort does not pass to the assignees of a master who has become bankrupt, as they have no right to make a profit of a man's wounded feelings (*l*)

It is no objection to this action by the master that the party seduced was of age at the time of the seduction;(*m*) nor that she was a married woman if living with her father, and acting as his servant, for it is not

(*b*) Per Tindall, C. J., in Grinnell v. Wells, ubi supra.

(*c*) In Dodd v. Norris, 3 Campb. 520, Lord Ellenborough expressed an opinion that it was necessary to watch that this anomaly should not be carried further, and that the original scope of the action should not be entirely lost sight of. Andrews v. Askey, 6 C. & P. 7, 9, note.

(*d*) Tullidge v. Wade, 3 Wils. 18; Edmondson v. Machell, 2 T. R. 4; Bennett v. Alcott, 2 T. R. 166; and see Duberley v. Gunning, 4 T. R. 651; Elliott v. Nicklin, 5 Price, 641.

(*e*) Selw. N. P. 1115; Southernwood v. Ramsden, H. T. 1805; Chambers v. Irwin, ibid. cit. Irwin v. Dearman, 11 East, 23; and see per Tindal, C. J., in Grinnell v. Wells, 7 M. & G. 1043.

(*f*) Per Lord Kenyon in Fores v. Wilson, Peake, 55; and see Winsmore v. Greenbank, Willes, 577.

(*g*) Fores v. Wilson, ubi supra. (*h*) Howard v. Crowther, 8 M. & W. 601.

(*i*) Edmondson v. Machell, 2 T. R. 4. (*k*) Irwin v. Dearman, 11 East, 23.

(*l*) Howard v. Crowther, 8 M. & W. 601; and see Beckham v. Drake, 2 Ho. Lords Cas. 579.

(*m*) Bennett v. Allcott, 2 T. R. 166; Tullidge v. Wade, 3 Wils. 18.

competent to a wrong doer to set up the rights of the husband as an answer to the action, if he do not interfere.(*n*)

The action may be brought either in trespass or case.(*o*) If the former is brought, as it more usually is when actual violence has been used, the plaintiff may also recover damages for any trespass committed in breaking and entering his house and assaulting himself.(*p*) If the latter form of action is adopted, the trespass is waved and the plaintiff can only recover for the consequential damage. But whatever the form of action, the allegation per quod servitium amisit is indispensable,(*q*) to sustain which it is necessary that the party seduced should be in the actual service of the plaintiff at the time of the seduction.(*r*) Where, therefore, the plaintiff's daughter was apprenticed to the defendant's wife for the purpose of learning the business of a milliner, and the defendant seduced her: it was held that the plaintiff could not maintain an action [*88] *against him for seduction.(*s*) So, a father cannot maintain an action for the seduction of a daughter, who is at the time of the seduction in the actual domestic service of another, although she intended to return to her father's house at the end of her term of service.(*t*) A mere temporary absence, however, from her father's house, as if on a visit to a friend, if not in the actual service of another, would not defeat the action.(*u*) Therefore, where the plaintiff's daughter *lived with* her brother, but went every day to her father's house to do all the household business as when she resided with him, and he kept no other servant; it was held that he might maintain an action for his daughter's seduction.(*v*) And where the defendant hired the plaintiff's daughter as his servant, with a view to obtain possession of her person in order to seduce her; it was held, that such a hiring would not defeat an action brought by her father, as it was merely a colourable hiring.(*w*)

Again, if a girl be seduced whilst out in service, and return to her father's house in a state of pregnancy, and he support her during and after her confinement, he cannot maintain any action for the seduction, as *he* did not *thereby* lose her services, she being in the service of another.(*x*) And so, if the jury find that the child of which the plaintiff's daughter was delivered was not the defendant's, although he was proved to have had connexion with her, the plaintiff can sustain no action against the

(*n*) Harper v. Luffkin, 7 B & C. 387.

(*o*) Chamberlain v. Hazlewood, 5 M & W. 515; S. C. 7 Dowl. 816.

(*p*) Ditcham v. Bond, 2 M. & S. 436.

(*q*) See Grinnell v. Wells, 7 M. & G. 1033; S. C. 2 D. & L. 610, where judgment was arrested for want of it.

(*r*) But a binding contract of service is not necessary; Harper v. Luffkin, 7 B. & C. 387.

(*s*) Harris v. Butler, 2 M. & W. 539; but see Speight v. Oliveira, 2 Stark. 493, infra, note (*w*).

(*t*) Dean v. Peel, 5 East, 46; Blaymire v. Haley, 6 M. & W. 55.

(*u*) Per Parke, B., in Blaymire v. Haley, ubi supra.

(*v*) Mann v. Barrett, 6 Esp. 32. (*w*) Speight v. Oliveira, 2 Stark. 493.

(*x*) Davies v. Williams, 10 Q. B. 725. In Joseph v. Cavander, Wint. Summ. As. 1834, (cited in Rosc. on Ev. 467,) the action was held to lie though the daughter had not actually been confined before action brought, and the plaintiff had voluntarily turned her out of his house upon discovering her pregnancy.

defendant, as he has sustained no loss of service by *the defendant's* act.(*y*) And it has been questioned whether a parent can maintain this action where the loss of service arose from distress of mind *consequent upon the abandonment after seduction; it being conceived that the damage was too remote.(*z*) [*89]

Where this action is brought by a parent for the seduction of a daughter who resides with him, evidence of very slight acts of service,(*a*) such as milking cows,(*b*) making tea,(*c*) and the like, has been held sufficient to prove the allegation of loss of service. Nay, the Courts are disposed to *infer* service from residence with the parent, where there is capacity to serve.(*d*) Whether or not the same inference could be drawn in the case of one standing in loco parentis, is not settled.

The action for seduction cannot be brought in the County Court.(*e*) It would seem, however, that a defendant might be held to bail if about to quit England.(*f*)

The daughter or servant may be a witness,(*g*) but the plaintiff is not bound to call her.(*h*) The omission to do so, however, would afford ground for such strong observations on the part of the defendant, that, in practice, it is usual to call her. She can, however, only be asked as to circumstances occurring before and *immediately after* her connexion with the defendant, to shew that it was against her consent.(*i*) And she is not bound to answer, on cross-examination, whether before her acquaintance with the defendant she had not been criminal with other men.(*k*) And when she has been cross-examined at length as to circumstances of extreme indelicacy and great levity of conduct in submitting to the defendant's embraces, those circumstances must be *explained, if capable of explanation, on re-examination; for the plaintiff cannot, in answer, call witnesses to her general character.(*l*) Though, in one case, where the cross-examination went to show that the plaintiff's daughter had conducted herself immodestly towards the defendant before her seduction, and that she kept improper company, witnesses were allowed to be called, on the part of the plaintiff, to prove the general good character and modest deportment of the daughter, and the general respectability of the family.(*m*) The plaintiff cannot give evidence of the *general* good character of the person seduced, except in answer to evidence of *general* bad [*90]

(*y*) Eager v. Grimwood, 1 Exc. 61. (*z*) Boyle v. Brandon, 13 M. & W. 738.
(*a*) Mansell v. Thomson, 2 C. & P. 303; Holloway v. Abell, 7 C. & P. 528.
(*b*) Bennett v. Alcott, 2 T. R. 168. (*c*) Carr v. Clarke, 2 Ch. Rep. 260.
(*d*) Maunder v. Venn, M. & M. 323; Torrence v. Gibbins, 5 Q. B. 300. See Jones v. Brown, Peake, 233; S. C. 1 Esp. 217, and per Parke, B. in Harris v. Butler, 2 M. & W. 539.
(*e*) 9 & 10 Vict. c. 95, s. 58.
(*f*) See Bullock v. Jenkins, 1 L. M. & P. 645. That, however, was an action of crim. con.
(*g*) Cock v. Wortham, 2 Str. 1054; S. C. Selw. N. P. 1114; and see Tullidge v. Wade, 3 Wils. 18.
(*h*) Farmer v. Joseph, Holt, 451. (*i*) Colyer v. Mayne, 2 Carr. & K. 1011.
(*k*) Dodd v. Norris, 8 Campb. 519.
(*l*) Dodd v. Norris, ubi supra; and see Bamfield v. Massey, 1 Campb. 460.
(*m*) Bate v. Hill, 1 C. & P. 100. See the note at the end of the case, where it is said, that the course adopted in that case is more conducive to the ends of justice, than that adopted in Dodd v. Norris; and see 1 Ph. Ev. 468.

character. And, therefore, where evidence is given of a specific breach of chastity, the plaintiff is restricted to disproving that act.(*n*) Nor can evidence be admitted, on the part of the plaintiff, to show that the defendant accomplished the seduction by means of a promise of marriage;(*o*) at least, not *directly*, for the purpose of increasing damages, though such evidence may be given *indirectly*, and is frequently received, for the purpose of vindicating the girl's character.(*p*) Declarations of the defendant's wife tending to show that she aided and colluded with the defendant in seducing the plaintiff's daughter, have been admitted in evidence in aggravation of damages.(*q*)

The defendant may plead that the person seduced was not the plaintiff's servant,(*r*) though it appears unnecessary to do so.(*s*) It is, however, safer to add such a plea, if it is intended to rely on that fact as a [*91] defence to *the action. But the defendant cannot pay money into Court.(*t*)

On the part of the defendant evidence may be given, in mitigation of damages, not only of the general bad character of the person alleged to have been seduced, but also of particular acts of unchastity on her part.(*u*) But he cannot call witnesses to prove that she has talked of another person than the defendant as her seducer and the father of her child, unless she be first asked, in cross-examination, whether she ever used those expressions.(*v*) Such evidence, however, might be admissible to shew general misconduct and frequent use of loose language.(*w*)

The plaintiff may recover damages for the injury which his feelings have sustained, in addition to the actual expense incurred by loss of service and payment of doctor's bills.(*x*) And in one case Lord Eldon told the jury, that in estimating the damage sustained by the plaintiff, they might look upon her as a parent losing the comfort as well as the service of her daughter, in whose virtue she could feel no consolation, and as the parent of other children, whose morals might be corrupted by her example.(*y*)

(*n*) Bamfield v. Massey, 1 Campb. 460. (*o*) Dodd v. Norris, 3 Camp. 519.

(*p*) Per Garrow, B. (in Elliott v. Nicklin, 5 Price, 647,) who was counsel in Dodd v. Norris; and see Tullidge v. Wade, 3 Wils. 18; Capron v. Balmond, Exeter Spr. Ass. 1831; Rosc. on Ev. 468.

(*q*) Knowles v. Compigne, Wint. Summ. Ass. 1835; Rosc. on Ev. 44.

(*r*) Torrence v. Gibbins, 5 Q. B. 297; Davies v. Williams, 10 Q. B. 725.

(*s*) Holloway v. Abell, 7 C. & P. 530; Eager v. Grimwood, 1 Exc. 61.

(*t*) 3 & 4 Wm. 4, c. 42, s. 21.

(*u*) Verry v. Watkins, 7 C. & P. 308; and see Rex v. Martin, 6 C. & P. 562; Reg. v. Robins, 2 M. & Rob. 512; Melhuish v. Collier, 15 Q. B. 878.

(*v*) Carpenter v. Wall, 11 A. & E. 803. (*w*) Ibid.

(*x*) As to doctor's bills, see Dixon v. Bell, 1 Stark. 287.

(*y*) Bedford v. McKowl, 3 Esp. 119.

*CHAPTER IV. [*92]

THE DUTIES OF THE MASTER TO THE SERVANT, AND THE RIGHTS AND REMEDIES OF THE SERVANT TO ENFORCE THE PERFORMANCE OF THEM.

Of the Master's duty to receive the Servant into his service, and to retain him; and the Servant's remedies for breach of such duties 92
Remedies for Servant wrongfully discharged 94
Of the Master's duty to pay the Servant's wages, and the Servant's remedies to recover them—Default; Bankruptcy; Death of Master—Default; Death of Servant 100
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OF THE MASTER'S DUTY TO RECEIVE THE SERVANT INTO HIS SERVICE AND TO RETAIN HIM; AND THE SERVANT'S REMEDIES FOR BREACH OF SUCH DUTIES.

It is obviously the duty of every man who has engaged another person as a servant, to receive such person into his service; and if he refuse to do so, without any good reason for his refusal, such person may maintain an action against him for that breach of contract.(*a*) *Thus, where the defendant agreed to take the plaintiff, who was a shepherd, into [*93] his service at certain wages, for the then next lambing season, for five weeks next ensuing after the 28th of February then next, but afterwards refusing to allow him to enter into his service, the plaintiff recovered damages in an action brought for such breach of contract on the part of the defendant.(*b*) To sustain this action, however, it would of course be necessary to prove a legally binding contract of hiring and service.(*c*) It is obvious that what would be a good reason for *discharging* a servant, would be an equally good reason for refusing to receive him into one's service after having engaged to do so. But it is no answer to an action for not performing an agreement to employ the plaintiff, that he has entered into a conspiracy to depart from the agreement, unless the conspiracy has been acted on.(*d*)

It is the duty of a master to retain the servant during the whole time that he has contracted to do so; and if he dismiss the servant before the expiration of that period without lawful cause,(*e*) the servant may maintain an action against him for such wrongful dismissal.

(*a*) Bracegirdle v. Herald, 1 B. & Ald. 722, ante, p. 17; Blogg v. Kent, 6 Bing. 614, where there is only one copy of the contract of hiring the Court will compel the party in whose possession it is, to produce it to the other party, ibid.

(*b*) Clark v. Allatt, 4 C. B. 335.

(*c*) Bracegirdle v. Heald, ubi supra. As to the requisites of the contract, see ante, ch. 2.

(*d*) Hemingway v. Hamilton, 4 M. & W. 115. See the pleadings in Mercer v. Whall, 5 Q. B. 447.

(*e*) See the preceding chapter as to what causes will justify the dismissal of a servant.

Where a servant is dismissed by his master during the period of service agreed upon, for alleged misconduct or other cause, the Court of Chancery will not interfere by injunction to restrain the master from so doing, but will leave the servant to his action at law. In a recent case,(*f*) Lord Cranworth, V. C., granted *an injunction to [*94] restrain the defendants, who kept a lucifer match manufactory, from discharging the plaintiff, who was appointed manager under a written agreement. But the Lord Chancellor (Lord Truro), on appeal, dismissed the order, saying he did not recollect any instance of any attempt on the part of a Court of equity to compel the employer to retain the servant, agent, or manager, and not to forbear to leave him to his remedy at law. "Consider," added his lordship, "what the effect would be: how is it possible for an employer or an agent to go on in the intimate connexion which such a contract is calculated to create? They are to be on the same premises—acting in the management of the same business in this case, and if there is mutual dissatisfaction, well or ill founded, it is perfectly clear that a management, conducted under such circumstances, must tend very much to the prejudice of the concern—in this case, I think, particularly."

REMEDIES FOR SERVANT WRONGFULLY DISCHARGED.

A servant, wrongfully discharged, has however the two following remedies open to him at law, either of which he may pursue immediately on his discharge.(*g*)

[*95] First. He may treat the contract of hiring and service *as *continuing*, and bring a special action against his master for breaking it by discharging him; and this remedy he may pursue whether his wages are paid up to the period of his discharge or not: or,

Secondly. If his wages are not paid up to the time of his discharge, he may treat the contract of hiring and service as *rescinded*, and sue his master on a quantum meruit for the services he has actually rendered.(*h*)

(*f*) Stocker v. Brockelbank, 20 L. J., N. S., Ch. Cas. 408. Where the master is a *trustee*, however, as in the case of trustees of a schoool, the Court of Chancery will sometimes, on a fit case being made out, interfere. See Willis v. Child, 13 Beav. 117; S. C. 20 L. J., N. S., Ch. Cas. 113, where Lord Langdale, M. R., granted an injunction to restrain the trustees of a charity school from discharging the master; and see Doe v. Willis, 5 Exc. 894.

(*g*) Pagani v. Gandolfi, 2 C. & P. 370. See 2 Smith's L. C. 20, note to Cutter v. Powell. It is there stated as the result of the authorities, that a servant wrongfully discharged has his election of *three* remedies, viz., the two spoken of in the text, and also "he may wait till the termination of the period for which he was hired, and may then, *perhaps*, sue for his whole wages in indebitatus assumpsit, relying on the doctrine of constructive service:" in support of which Gandall v. Pontigny, 1 Stark. 198; S. C. 4 Campb. 375, and Collins v. Price, 4 Bing. 132, are cited. But it is also added, "vide tamen, the observations of the Judges in Smith v. Hayward, 7 A. & E. 544." It is conceived, however, that this third course *cannot* be adopted, and that the cases which appear to support it must now be considered to be overruled. See Fewings v. Tisdal, 1 Exc. 295; Elderton v. Emmens, 6 C. B. 160; Goodman v. Pocock, 15 Q. B. 576; Beckham v. Drake, 2 Ho. Lords Cas. 606, where Erle, J., said, "where a promise for continuing employment is broken by the master, it is the duty of the servant to use diligence to find another employment."

(*h*) Lilley v. Elwin, 11 Q. B. 755; Planche v. Colburn, 8 Bing. 14; Archard v. Horner, 3 C. & P. 349.

The former of these, however, is the remedy more usually adopted. And it is the preferable one, as, in the latter case, the action is founded on an implied contract arising out of *actual* services, and no such contract arises by implication of *law* upon a simple dissolution of a special contract of hiring and service;(*i*) and though a jury are at *liberty* to imply such a contract from circumstances,(*k*) and probably would in most cases do so, yet they are not *bound* to do so, and could only imply a contract to pay wages for the services *actually rendered.* And therefore, in the latter form of action, a servant *could* only recover wages up to the time of his discharge; whilst in the former case, the action being founded on a contract, which the law would imply on the part of the master, to indemnify the servant against all such damages as he had sustained by reason of the master's breach of contract in discharging the servant, and not allowing him to perform *his* part of the contract,—the servant, if he recovered at all, would recover something *beyond* the amount of wages due at the period of his discharge.(*l*)

First. Of the action for wrongful dismissal.(*m*)

The right of a servant wrongfully discharged to maintain this action does not depend on the question whether or not his wages are paid up to the period of his discharge. It is utterly irrespective of that. In this action the servant seeks compensation, not for services he has rendered previous to his discharge, but *for the injury he *has sustained by such discharge,* in not being allowed to serve and earn the [*96] wages agreed upon.(*n*)

In order to entitle a servant to maintain this action, he must be ready and willing to continue in his master's service, at the time he is discharged.(*o*) And this readiness implies his *ability* to do so,(*p*) for if he enter the service of another before his discharge, and is thereby disabled from serving his first master in the manner contracted for, he could not be *ready* to serve him.(*q*) And upon a traverse of that averment his action would be defeated. But although it is necessary that he should be ready and willing, and able to serve his master, in order to enable him to sue his master for a wrongful discharge, it is not necessary that he

(*i*) Lamburn v. Cruden, 2 M. & G. 253.

(*k*) Ibid; and see Thomas v. Williams, 1 A. & E. 685, and Planche v. Colburn, 5 C. & P. 61.

(*l*) See further as to damages, post.

(*m*) As to the form of the declaration see Lush v. Russell, 4 Exc. 637; S. C. 7 D. & L. 228. In Crocker v. Molyneux, 3 C. & P. 470, it was held, that a servant who was hired 'at thirty guineas a year and a suit of clothes,' and was provided with a livery, but was dismissed without sufficient cause before the end of the year, could not maintain trover for the livery against his mistress, the property in which was in his mistress who had provided it; and that his remedy was an action for not being allowed to serve to the end of the year, and so to become entitled to the livery."

(*n*) See Elderton v. Emmens, 6 C. B. 187, and Beckham v. Drake, 2 Ho. Lords Cas. 606.

(*o*) See 2 Wms. Saund. 352, et seq.; notes to Peters v. Opie.

(*p*) Per Alderson, B., Wallis v. Warren, 4 Exc. 364.

(*q*) Spotswood v. Barrow, 1 Exc. 804; S. C. 5 D. & L. 373, where a plea that the plaintiff entered the service of another, was held bad on special demurrer, as being an argumentative traverse of his readiness to serve the defendant.

should *offer* to do so,(*r*) if he can prove his *readiness*, &c., in any other way. It is obvious, however, that an *offer* to discharge his duty is the best proof of his readiness to do it.

In this form of action the plaintiff cannot recover wages *due*(*s*) for the period during which he has actually served. These wages must be recovered on the count for wages, which may be added to the count for wrongful dismissal.

Therefore, where(*t*) in an action for wrongful dismissal it appeared that the defendant was chairman of a company by which the plaintiff was retained in the capacity of superintendent of works, "the salary to be at the rate of one hundred and fifty guineas per annum, either party to have the option of terminating the engagement by giving one month's written notice; and that at the end of eighteen months the plaintiff was dismissed without notice, no wages having been paid him. And a month [*97] *after dismissal the plaintiff brought his action upon the agreement, stating as the breach of it that the defendant would not continue the plaintiff in his employ till the expiration of such month's notice, but discharged him in the middle of a year without notice; but the declaration did not contain the common count for wages: it was held, that the plaintiff could not, without that count (which he might have added) recover any thing more than a month's wages, the loss of them being the damage he had sustained by not having received the month's notice agreed upon.

But a servant whose wages are payable at *stated periods*, as quarterly, and who is wrongfully discharged between those periods, as in the middle of a quarter, may in this form of action recover wages for the period of service which has elapsed since the last periodical payment of his wages in the shape of damages for his master's breach of the contract between them. And if he elect to bring this action for his wrongful discharge, and wages for the broken period of service are not included in the damages recovered in it, he cannot afterwards recover them in an action for wages, as the action for wrongful discharge treats the contract of hiring and service as still in existence, while the action for wages earned in a broken quarter treats it as rescinded. And the servant cannot do both, that would be allowing him to blow both hot and cold.(*u*)

Where an action for wrongful discharge (the declaration in which also contained counts for wages, and work and labour, &c.) was referred to an arbitrator, who awarded to the plaintiff a sum of money equivalent in amount to the wages he would have been entitled to receive from the defendant on the day when the action was commenced; but no claim was made before the arbitrator for any compensation in damages for the dis-

(*r*) Wallis v. Warren, 4 Exc. 361; and see Levy v. Lord Herbert, 7 Taunt. 314; but see Wilkinson v. Gaston, 9 Q. B. 137.

(*s*) See Goodman v. Pocock, 15 Q. B. 576, that he may recover damages for service during a broken period.

(*t*) Hartley v. Harman, 11 A. & E. 798.

(*u*) Goodman v. Pocock, 15 Q. B. 576; S. C. 19 Law J., N. S., Q. B., 410. Therefore, if the declaration contain a count for wages, as well as one for wrongful discharge, the plaintiff must be careful to take a verdict on *one only* of those counts, not on both. See per Coleridge, J., ibid.

missal, except so far as the special count in the declaration, and the evidence of the employment and dismissal might amount to such a claim; it was held, that the plaintiff could not afterwards sustain another action for *compensation in damages, in consequence of the dismissal from the defendant's employ before the end of the year, but that the award of the arbitrator was a bar to such action.(v) [*98]

If in an action for wrongful discharge the defence insisted on is that the defendant was justified in discharging the plaintiff, such defence must be specially pleaded,(w) and cannot be given in evidence under the general issue.(x) And so in an action for wages upon an implied contract, a defendant who has only pleaded the general issue cannot go into evidence of misconduct, except such as goes to shew that there was *no* implied contract to pay wages.(y)

The amount of damages which a servant would recover in an action for wrongful discharge must of course depend on the nature of the contract, and the wages agreed to be paid. In the case of a domestic or menial servant,(z) or where there was an express agreement for a month's notice,(a) it would be a month's wages; but, generally speaking, the amount of damages is a question for the jury to determine: and in a recent case,(b) in which a clerk who had been hired for two years was wrongfully dismissed after about one quarter's service, and then brought his action for such wrongful dismissal, and the jury awarded him a sum equal to twelve months' salary, the Court of Common Pleas refused to interfere, not considering the damages excessive. Where no specific wages have been agreed upon, the measure of damages is obtained by considering what is the usual rate of wages for the employment contracted *for, and what time would be lost before a similar employment could be obtained. [*99]

In a case where(d) the defendants, directors of a mining company in South America, agreed to employ the plaintiff as superintendent of mines for three years, at a salary increasing yearly, and the directors were at liberty to dissolve the agreement at any time on giving the plaintiff twelve months' notice, or paying him twelve months' salary in lieu of such notice, and a reasonable sum towards defraying his expenses to England; and if the plaintiff served the three years, he should be entitled to the expenses attending the return of himself and his family: the directors dismissed him before the expiration of the second year, without giving him notice, or paying him the year's salary: It was held, that he was only entitled to one year's salary from the date of his dismissal,

(v) Dunn v. Murray, 9 B. & C. 780.

(w) Where to an action of wrongful dismissal the defendant pleaded, that the plaintiff misconducted himself, without this that the defendant dismissed him without reasonable cause, upon which plea the plaintiff joined issue, it was held, that the plaintiff's misconduct, as well as the fact of dismissal, was in issue. See Lush v. Russell, 5 Exc. 203; S. C. 1 L. M. & P. 369; but see Powell v. Bradbury, 7 C. B. 201.

(x) Speck v. Phillips, 5 M. & W. 279. See the preceding chapter as to what causes will justify the discharge of a servant.

(y) Cooper v. Whitehouse, 6 C. & P. 545. (z) Fewings v. Tisdal, 1 Exc. 295.

(a) Hartley v. Harman, 11 A. & E. 798. (b) Smith v. Thompson, 8 C. B. 444.

(c) See per Erle, J., in Beckham v. Drake, 2 Ho. Lords Cas. 606.

(d) French v. Brooke, 4 M. & P. 11.

and to his own expenses for his return to England: and the jury having found for these sums only, the Court refused to increase the verdict by adding expenses incurred by the plaintiff for the return of his family, or for the salary which would have accrued from the time of his dismissal to the end of the third year, when his service would have terminated.

Secondly. Of the common action for wages brought by a servant wrongfully discharged.

This form of action, treats the contract of hiring and service as *rescinded.* The ground on which a servant wrongfully discharged may support it, is one equally applicable to all contracts, viz.: that when one party to a contract has absolutely refused to perform something essential on his side of the contract, the other party is at liberty to rescind it, and sue for what he has already done under it upon a quantum meruit.(*e*)(1).

Where the servant elects to pursue this remedy *immediately* on his discharge, he can *only* recover wages for the period during which he has [*100] *actually served.*(*f*) *And it is conceived that even if he wait till the expiration of that period for which he agreed to serve, and then bring an action in this form, he cannot recover any more.(*g*)

And where a servant has refused to treat the contract of hiring and service as rescinded by his wrongful discharge, and has brought a special action against his master for such wrongful discharge, he cannot afterwards treat the contract as rescinded, and sue in this form of action for wages during a broken quarter,—they must be recovered in the special action or not at all.(*h*)

OF THE DUTY OF THE MASTER TO PAY THE SERVANT HIS WAGES, AND OF THE SERVANT'S REMEDIES TO RECOVER THEM.—DEFAULT; BANKRUPTCY; DEATH OF MASTER.—DEFAULT.—DEATH OF SERVANT.

Unless the circumstances under which services of any sort have been rendered by one person to another, are such as to afford evidence of a contract, either express or implied, on the part of the person served to pay for them, there is no duty binding him to do so: and it is clear that the servant cannot maintain an action for wages for such services.(*i*) Where, therefore, a person who had been a slave in the West Indies on an estate belonging to a lady, came over with her to England, and con-

(*e*) See 2 Smith's L. C. 18, note to Cutter v. Powell, where the cases are collected. Planche v. Colburn, 8 Bing. 14; Archard v. Horner, 3 C. & P. 349; Smith v. Hayward, 7 A. & E. 544; Fewings v. Tisdal, 1 Exc. 295.

(*f*) Smith v. Hayward, 7 A. & E. 544; Fewings v. Tisdal, 1 Exc. 295. See as to the form of particulars of plaintiff's demand; Harris v. Montgomery, 2 L. M. & P. 425.

(*g*) Ante, p. 94, note (*g*). (*h*) Goodman v. Pocock, 15 Q. B. 576.

(*i*) The mere existence of a valid contract of hiring and service does not necessarily imply a contract to pay wages; as it often happens with boys and others that their board, lodging, and clothes, together with the opportunity of learning their master's business, or the latter consideration alone, is a sufficient compensation for their services. See Rex. v. Shinfield, 14 East, 541.

(1) See Mr. Wallace's note, and cases there cited, 2 Sm. L. C. p. 28, 3rd Am. ed.—1847.

tinued in her husband's service in England: it was held that he could not maintain any action for wages against the husband without some evidence of a promise by him to pay wages.(*k*) And so where a man *and wife lived with his brother and assisted him in carrying on his business: it was held to be clear that he and his wife were [*101] not entitled to be paid for their services, unless the jury were satisfied that there was a contract express or implied on the part of the defendant to pay for such services.(*l*)

Upon similar principles it is equally clear, that where a stipulated remuneration has been agreed upon, the servant has no claim to *additional* remuneration on the mere ground of his performance of additional services; unless he can prove some contract either express or implied on the part of his master to pay him an increased salary for his additional services, he can recover no remuneration for them. Thus, where a clerk to the commissioners of land tax employed the plaintiff as his deputy at a salary of 100*l.* a year, and on new duties being imposed, which gave the clerk additional work, the plaintiff also performed that: it was held, that he was not legally entitled to any additional salary on that account: Lord Kenyon observing that, if he was, every porter in a shop or clerk in an office would, upon an increase of his master's business, be equally entitled to demand an increase of wages.(*m*)

And it has been held, that upon a simple dissolution of a special contract of hiring and service, no new contract arises, by implication of law, in respect of services performed under such special contract previously to its being so dissolved.(*n*)

Where, therefore, the plaintiff was engaged as superintendent of packets in the service of a steamboat company at a yearly salary payable quarterly; and a month after the termination of one of the years of the service tendered his resignation, which after another month was accepted, but nothing was said about remuneration for the time elapsed since the termination of the last year's service: it was held, that the law would not imply an engagement to pay for the services performed during that time, but that it ought to have been left to the jury to say whether the parties had come to an agreement that those services should be paid for. In fact, it may be said to be a question for a jury in all cases where *services have been rendered without any express contract to pay [*102] for them, whether or not there was an implied contract to do so.

In such cases the defendant may give such evidence as goes to show that the circumstances from which the plaintiff would induce a jury to imply a contract to pay wages, do not warrant any such inference: as that the plaintiff cohabited with him; since that goes to shew that the contract was not one of hiring and service, but of a different nature.(*nn*) Or the defendant may shew that the plaintiff misconducted himself in

(*k*) Alfred v. Fitzjames, 3 Esp. 3; and see Rex v. Thames Ditton, 4 Doug. 300, where Lord Mansfield said, that he always nonsuited slaves who had been brought over to England and commenced actions for wages.

(*l*) Davies v. Davies, 9 C. & P. 87.

(*m*) Bell v. Drummond, Peake, 45; and see Harris v. Watson, Peake 72.

(*n*) Lamburn v. Cruden, 2 M. & G. 253.

(*nn*) Bradshaw v. Hayward, Carr. & M. 591.

such a manner as to rebut any inference of an implied contract to pay for his services. But unless such evidence shews that there was no implied *contract* at all, the plaintiff's misconduct should be specially pleaded.(*o*) Both the plaintiff and defendant may also give evidence of the value of the services rendered.(*p*)

It sometimes happens that, by the terms of the agreement entered into, it is left to the employer to determine whether or not *any* remuneration should be paid for services rendered, and what amount should be paid. In such cases, if it appear *clearly* to have been the intention of the parties that the employer should decide whether or not he would make any remuneration for the services rendered, no action can be maintained against him, by the person employed, unless the employer has, after the performance of the work, expressly promised to pay something.

Thus where a person performed work for a committee, under a resolution that any service to be rendered by him should, at a certain time, be "taken into consideration, and such remuneration be made as should be deemed right:" it was held, that no action would lie to recover remuneration for such work, as the person employed threw himself upon the mercy of the committee, who were to judge whether he should have any thing, and, if any thing, then how much.(*q*)

[*103] *But if it appear from the agreement to have been the intention of the parties that the servant *should be remunerated*,(*r*) but the *amount* of his remuneration was not settled, he will be entitled to recover upon the quantum meruit the fair value of his services, and the defendant may, of course, show that they were not so valuable as the plaintiff would make out.(*s*) Thus, where a law stationer(*t*) said to his son on coming of age, "You shall have fifteen shillings a week till October: the books will then be made up, and you shall have *a share;* we need not talk of the share till October comes; we shall settle it then:" Lord Ellenborough held, that the son was evidently entitled to a beneficial interest in the business, leaving the amount to be settled when the books should be balanced; and that the jury must consider what was a fair and just proportion for the father to give, and the son to expect, after what had passed between them.

So where A. agreed(*u*) to enter into the service of B., and wrote to him a letter as follows,—"I hereby agree to enter your service as weekly manager, commencing next Monday: and the amount of payment I am to receive I leave entirely to you;"—and A. served B. in that capacity for six weeks: it was held (Parke, B., dissentiente) that the contract implied that A. was to be paid something, at all events, for the services

(*o*) Cooper v. Whitehouse, 6 C. & P. 345. See Monkman v. Shepherdson, 11 A. & E. 411, where to an action for wages the defendant pleaded an agreement that the plaintiff should have none if he got drunk, &c.

(*p*) Baillie v. Kell, 4 Bing. N. C. 638; Bird v. McGahey, 2 Carr. & K. 707, post, p. 103.

(*q*) Taylor v. Brewer, 1 M. & S. 290.

(*r*) As is generally the case where professional men are employed. In such cases, however, the onus lays upon the plaintiff to make out his case if the employer raise a doubt whether the services were not to be gratuitous; Hingeston v. Kelly, 18 L. J., N. S., Exc. 360.

(*s*) Baillie v. Kell, 4 Bing. N.C. 638.

(*t*) Peacock v. Peacock, 2 Camp. 45.

(*u*) Bryant v. Flight, 5 M. & W. 114.

performed, and that the jury, in an action on a quantum meruit, might ascertain what B., acting bona fide, would or ought to have awarded.

And where a verbal agreement had been made,(*v*) on behalf of a board of guardians, with a surgeon, to attend a number of pauper children who had been attacked by *Asiatic cholera, for which he was to receive *whatever remuneration the board of guardians should allow as right and proper,* and he attended them for several weeks, after which the board tendered him fifty pounds as a remuneration: it was held, by Maule, J., that he might maintain an action for what was right and proper, and left it to the jury to ascertain what the board, acting bona fide, ought to have awarded. [*104]

If either of the above questions depend upon the certificate of a third person, the obtaining such certificate is, in general, a condition precedent to the right of the servant to maintain any action, and if it is withheld by such third person, even by fraud, no action for wages can be maintained by the servant. His remedy is an action against the third person for withholding the certificate.(*w*) In a case,(*x*) therefore, where the plaintiff agreed to serve the defendant as apothecary's assistant for one year gratuitously, and after that to receive such salary as C. should think reasonable, and it appeared that no application had been made to C. to fix any salary: it was held, that the plaintiff could not recover any salary.

By the Truck Act,(*y*) which does not apply to domestic servants or servants in husbandry,(*z*) the payment, in certain trades, of wages in goods, or otherwise than in the current coin of the realm, is prohibited.

The action for wages should of course be brought against the person by or for whom the plaintiff was hired. Where a dissenting minister was appointed to a chapel by *part* of the trustees, but received a notice discharging him and demanding possession of the chapel, signed by *all* the trustees, upon which he sued them *all* for his salary; he was nonsuited.(*a*) But it has been held, in the case of a servant engaged by one of several partners, that *all* the partners would be liable, if the contract was made in respect of the partnership,(*b*) *although the contract was in writing, (not being by deed,) and signed by one only. However, where one proprietor of a newspaper contracted with a person to write articles for it, other proprietors, who were no parties to the contract, [*105]

(*v*) Bird v. McGaheg, 2 Carr. & K. 707. In this case evidence was admitted of the scientific skill of the plaintiff. See Baxter v. Gray, 3 M. & G. 771, where a surgeon, who had attended a patient in expectation of a legacy, was allowed to maintain an action for his services against the patient's executors, having been disappointed of his legacy.

(*w*) See the cases of Morgan v. Birnie, 9 Bing. 673; Milner v. Field, 5 Exc. 829, which were cases of building contracts where the architect's certificate had not been obtained. (*x*) Owen v. Bowen, 4 C. & P. 93.

(*y*) 1 & 2 Wm. 4, c. 37. On the construction of this act see Chawner v. Cummings, 8 Q. B. 311; Riley v. Warden, 2 Exc. 59.

(*z*) Sect. 20. The trades to which it does apply are specified in sect. 19.

(*a*) Cooper v. Whitehouse, 6 C. & P. 545.

(*b*) Beckham v. Knight, 1 M. & G. 738; Drake v. Beckham, 9 M. & W. 79; S. C. 11 M. & W. 315, 2 Ho. Lords Cas. 579, 623.

cannot be made liable to pay the salary of such person by means of the statute 6 & 7 Wm. 4, c. 76.(c)

Where the amount sought to be recovered for wages is under fifty pounds, the plaintiff may sue for them in the county court.(d) Where the amount is under twenty pounds, he must sue in that court, or he will lose his costs.(e) And in certain cases, wages of small amount due to workmen and labourers, may be recovered by summary proceeding before a magistrate.(f)

When, by his particulars of demand, the plaintiff claimed wages: it was held, that he could not recover a claim for a per centage, by way of commission, on business introduced by him to the defendant.(g)

A master cannot set off, against a claim for wages, money paid by him to his own medical attendant for attendance on a servant, unless there was a special agreement between the master and servant that he should do so.(h)(1) Nor can he set off, against a claim for wages due to a female servant under age, money advanced by him to her to purchase a silk dress and other articles not necessary for a person in her station in life,(i) nor coach fare paid for the mother of such servant.(k)

It sometimes happens that wages, which have actually been paid, are again demanded, in consequence of no receipt having been taken. In such cases the court will sometimes presume, from the lapse of time or other *circumstances, that they have been paid, and the servant will not be allowed to recover in an action for them. [*106]

Thus, in a case tried many years ago at Guildhall, which was an action by a workman at a sugar refinery, a witness proved that the plaintiff had worked there for more than two years. But Abbott, C. J., said that he should direct the jury to presume that men employed in that way were regularly paid every Saturday night, unless some evidence were given on the part of the plaintiff to satisfy the jury that the plaintiff had, in point of fact, never been paid; and as no such evidence was produced, the plaintiff was nonsuited.(l)

And in an action for wages as a menial servant, Gaselee, J., ruled that, in the regular course, if a servant has left a considerable time, the presumption is that all the wages have been paid.(m)

The payment of wages due to clerks, servants, and workmen, in the event of their master's bankruptcy, is provided for by the Bankrupt Law Consolidation Act, 1849;(n) by sect. 168 of which it is enacted, "that

(c) Holcroft v. Higgins, 2 C. B. 488. (d) 13 & 14 Vict. c. 61.

(e) Although suing in forma pauperis; Chinn v. Bullen, 8 C. B. 447; S. C. 7 D. & L. 297; 9 & 10 Vict. c. 95; 13 & 14 Vict. c. 61; and see Lyons v. Hyman, 1 L. M. & P. 601; East Anglian Railway Company v. Lythgoe, 2 L. M. & P. 221.

(f) See ch. 9, post.

(g) Law v. Thompson, 15 M. & W. 541; S. C. 4 D. & L. 54.

(h) Sellen v. Norman, 4 C. & P. 80.

(i) Hedgeley v. Holt, 4 C. & P. 104. (k) Ibid.

(l) Note to 4 C. & P., p. 81.

(m) Sellen v. Norman, 4 C. & P. 80. In a note to this case the reporter with truth says, "It would often save persons great inconvenience and expense if, when they paid a servant's wages, they took a regular receipt."

(n) 12 & 13 Vict. c. 106.

(1) See Early v. Craddock, 4 Rand. R. 423.

when any bankrupt shall have been indebted, at the time of issuing the fiat or filing the petition for adjudication of bankruptcy, to any *servant or clerk*(*o*) of such bankrupt in respect of the wages or salary of such servant or clerk, it shall be lawful for the court, upon proof thereof, to order so much as shall be so due, not exceeding three months'(*p*) wages or salary, and not exceeding 30*l.*, to be paid to such servant or clerk out of the estate of such bankrupt; and such servant or clerk shall be at liberty to prove for any sum exceeding such amount."

This very humane and beneficial enactment appears *to have been originally borrowed from the Scotch law.(*q*) The first positive enactment on the subject contained in the English Bankrupt Law was the 6 Geo. 4, c. 16, s. 48. Before the passing of that act, a practice prevailed of paying clerks and servants full six months' wages out of the bankrupt's estate; and the operation of that act, which empowered the commissioners to order payment of so much as should be due, not exceeding six months' wages, was to legalize that practice.(*r*) The 6 Geo. 4, c. 16, however, (as well as the 5 & 6 Vict. c. 122, which reduced the amount to *three* months' wages,) is now repealed, and the enactment above set forth is the one at present in force. But as the decisions upon 6 Geo. 4, c. 16, s. 48, are in many respects applicable to the present law, which, as it will have been observed, only differs from the previous acts in the *amount* which may be ordered to be paid, it will be convenient to set before the reader some of the more important and useful of those decisions. [*107]

Under that act,(*s*) it was held, that the bankruptcy of the master did not operate to dissolve a contract of hiring;(1) and that the master might notwithstanding his bankruptcy and certificate, be liable to pay the servant his wages. Thus, in an action for wages (to which the defendant pleaded his bankruptcy and certificate,) where it appeared that the plaintiff, in October, 1826, entered as clerk into the service of the defendant, an auctioneer, at a salary of 60*l.* per annum. The defendant became bankrupt, and a commission issued on the 10th of July, 1828. He had been imprisoned about a month before that time under an Exchequer process at the suit of the Crown, and remained in prison a year after the commission had issued. From the commencement of the imprisonment till the issuing of the commission, and *for ten*

(*o*) As to labourers and workmen, vide post, p. 111.

(*p*) By the interpretation clause, sect. 276, the word "month," means calendar month. The 5 & 6 Vict. c. 122, ss. 28, 93, was in similar terms. But the corresponding enactment in the old Bankrupt Act, 6 Geo. 4, c. 16, s. 48, whereby the commissioners had power to order payment of *six* months to servants and clerks, was held to mean six *lunar* months; Ex parte Humphreys, 1 Mont. & Bligh. 413; 3 Deac. & Chit. 114.

(*q*) See a learned note of the reporters; Mont. & M. 161, citing 2 Bell Comm. 164; and see Ex parte Crawford, Mont. & M. 275. There is a similar provision in the Code Napoleon; Code Civil, l. 3, t. 18, art. 2101.

(*r*) See per Lord Denman in Thomas v. Williams, 1 A. & E. 690. The assignees of a bankrupt or insolvent cannot let out for hire his personal services, necessary for his maintenance; Williams v. Chambers, 10 Q. B. 337.

(*s*) Thomas v. Williams, 1 A. & E. 685; S. C. 3 Nev. & M. 545.

(1) See Versailles v. Hall, 5 Miller's Louis. Rep. 266.

days after, the defendant's business was conducted by his brother. [*108] The plaintiff attended from October, 1826, *as long as the brother conducted the business, but ceased to do so when the brother ceased to conduct the business; and when he ceased 10*l.* wages were due pro rata. It was left to the jury to say whether the contract had been dissolved *after the issuing of the commission* by mutual consent; and they found that it had. In the following Term a motion was made for a rule to enter a nonsuit, on the ground that the bankruptcy operated to dissolve the contract. But the rule was refused: and Lord Denman said that the 48th section of 6 Geo. 4, c. 16, "made no alteration in the legal effect of the contract of hiring, and, consequently, that as the wages had not become due at the time of the commission, either by efflux of time or by a dissolution of the contract, the bankrupt's certificate forms no defence to this action." And added, "that no inconvenience was likely to occur from his decision, as persons in the plaintiff's situation must be expected to avail themselves of the section above referred to."

It will be observed, however, that in Thomas v. Williams, the plaintiff *continued to act* as the defendant's clerk *after* the commission issued; and therefore, it was unnecessary to decide, and that case cannot be considered as an authority, that where a servant, whose wages are due periodically, ceases to act *immediately* on his master becoming bankrupt, the master will be liable, after he has obtained his certificate, to an action for wages for such period as may have elapsed between the last time when wages became due and bankruptcy. In such case it is conceived that the certificate would be a bar; since the bankruptcy, and the fact that the servant thereupon ceased to serve, would be evidence from which might be inferred a dissolution of the contract of hiring by mutual consent, *and* an agreement that the servant should be paid pro rata for the broken period of service.(*t*) It can only be on the ground that the contract of hiring *is rescinded*, that a servant whose wages are due periodically, is entitled, on his masters bankruptcy, to be paid in full wages for *a broken period of service*,—for the act of Parliament only authorizes the payment of wages in full where the master *shall have been indebted* at the time of issuing the fiat,—and unless the contract was rescinded, he was not indebted. [*109] And *it must be borne in mind that this provision, which gives a preference to one class of creditors over another, must, on that account, be construed strictly.(*u*)

And in order to entitle a servant to the benefit of the above provision of the bankrupt law, Lord Eldon held, that his service must have been rendered under *a contract* of hiring. And, therefore, where a son had lived with his father seven years as a clerk, receiving only board and lodging, and there was no actual contract for wages,—though the father swore it was always his intention to pay him something for his services, and the assignees did not object,—yet Lord Eldon, though he lamented the hardness of the case, said, that as there was in reality no contract for wages, he could make no order for the son to prove.(*v*)

(*t*) See Lamburn v. Cruden, 2 M. & G. 253.
(*u*) See Ex parte Hampson, 2 Mont. D. & D. 462.
(*v*) Ex parte Glover, 1 Mont. Dig. 165. See Deac. & De G. on Bank. vol. 1, p. 261, 262.

But it seems to have been considered that there was no general rule as to what hiring was sufficient to entitle a servant or clerk to the benefit of the act, 6 Geo. 4, c. 16, s. 48.(*w*) However, weekly labourers and workmen, employed as excavators, were considered not to come within the meaning of that section.(*x*) But it was not thought necessary that the service should be under a yearly hiring, though there must have been an engagement of a more permanant nature than a weekly hiring.(*y*) And therefore, where an overlooker or manager of a cotton mill was engaged at 33*s.* per week, but subsequently a contract was entered into that he should be paid 104*l.* per annum, to be paid in weekly sums, he was held to come within the act.(*z*) And a person engaged at an annual salary was also held within the act.(*a*)

And where a person entered into an agreement with *his father to serve him as clerk and foreman in consideration of two suits per [*110] annum and two guineas a week, he was held within the act.(*b*)

And it was also held that the mate of a vessel, hired by the bankrupt, who was master and part-owner, under a verbal agreement, was entitled to six months' wages.(*c*)

In a case,(*d*) in which it was decided that a clerk who left the bankrupt's service six months before the fiat issued, on account of his having assigned all his property in trust for his creditors, thereby putting it out of his power to pay the clerk, was entitled to six months' wages under the act,—the Court pronounced no opinion whether servants *voluntarily quitting* the service of their masters did or did not come within sec. 48.—The ground, however, on which that case was decided was, that although there was an interval of six months between the quitting of the service and the fiat, yet the servant quitted in consequence of his master having assigned all his estate and effects, and, thereupon, ceased to carry on his trade, which was an act of bankruptcy, whereby the servant lost his employment as well as his wages.(*e*)

But in another case,(*f*) where it appeared that about twelve months before the bankruptcy, the bankrupt compounded with his creditors, and it was then agreed between the bankrupt and his clerk that he should quit the service of the bankrupt, and that a year's wages, amounting to 250*l.*, should remain as a debt instead of being included in the composition: and the clerk then quitted the service and obtained another similar situation, the bankrupt's son succeeded him as clerk to the bankrupt, and the trade being carried on as usual for another year, when the bankruptcy took place: the clerk was not allowed six months' wages in full after he had allowed a first and final dividend to be declared.

And it was held, that the workmen of a coachmaker, who worked by

(*w*) Per Sir G. Rose, Ex parte Collyer, 2 Mont. & A. 29; S. C. 4 D. & C. 520.

(*x*) Ex parte Crawfoot, Mont. 270; Ex parte Skinner, Mont. & Bli. 417; S. C. 3 D. & C. 332, where a coachguard and weekly servant at 2*l.* per week, was held not to be entitled to the benefit of the act. See now sect. 169, post p. 111.

(*y*) Ex parte Collyer, ubi supra. (*z*) Ex parte Collyer, ubi supra.

(*a*) Ex parte Neal, Mont. & M. 194.

(*b*) Ex parte Humphreys, Mont. & Bli. 413; S. C. 3 D. & C. 114.

(*c*) Ex parte Homborg, 2 Mont. D. & D. 642.

(*d*) Ex parte Saunders, 2 Mont. & A 684. (*e*) Ex parte Gee, Mont. & Ch. 108.

(*f*) Ibid.

the piece and received a specified sum for each particular job under separate and distinct *contracts, and where there was no hiring for a [*111] specific time, were not servants within sec. 48.(*g*)

It would seem, however, that if the misconduct of the clerk has been such as would have justified his dismissal without wages, he might be deprived of his right to be paid his wages in full.(*h*)

And it is to be observed, that the payment of wages is not to be out of the *first* moneys got in, but as soon as there is a sufficient fund for the purpose, after providing for the expense of working the fiat.(*i*)

And by 12 & 13 Vict. 106, s. 169,(*k*) it is also enacted, that when any bankrupt shall have been indebted, at the time of issuing the fiat or filing the petition for adjudication of bankruptcy, to any *labourer or workman* of such bankrupt, in respect of the wages or labour of such labourer or workman, it shall be lawful for the Court, upon proof thereof, to order so much as shall be so due, not exceeding forty shillings, to be paid to such labourer or workman out of the estate of such bankrupt; and such labourer or workman shall be at liberty to prove for any sum exceeding such amount.

By the death of the master the servant is discharged (*l*) (1) And it

(*g*) Ex parte Grellier, Mont. & M. 95.
(*h*) Ex parte Hampson, 2 Mont. D. & D. 462. (*i*) Ibid.
(*k*) See the corresponding enactment in 5 & 6 Vict. c. 122, s. 29.
(*l*) Wen. Off. Ex. 141, 14th ed.; Wms. Exc. 644; but see Rex v. Ladock, Burr. S. C. 179; 2 Bott. 277; 1 Nol. P. L. 461, where it was held that a pauper gained a settlement by serving out the year with the executors of the master who died in the middle of the year; on the ground, that the service to the executors was a *continuance of the same service and not a new contract;* and see also Jackson v. Bridge, 12 Mod. 650. A contract of apprenticeship in so far as it was a *personal* contract is put an end to by the death of the master; Rex v. Peck, 1 Salk. 66; Baxter v. Burfield, 2 Str. 1266; Bac. Abr. tit. "Master and Servant," G.; Mardell v. Thelusson, Q. B. Trin. T. 1852.

(1) It was decided in Vermont that the *indentures of apprenticeship* became voidable upon the death of the master, or upon an assignment of the apprentice. It is believed that the law upon this point has been altered by the revised statutes of 1839. By this statute, the minor is absolutely discharged by the death of the master, and may be bound out anew. The County Court also has power to discharge the apprentice when the master is brought before it, charged with a breach of the covenants contained in the indentures. Rev. Stat. Vt. 1839, p. 347. By the statutes of New York, the General Sessions of the Peace, or two justices, possess the power of discharging him. Rev. Stat. New York, vol. ii. p. 169. In Pennsylvania this power is exercised by the Court of General Sessions, whenever the acts of the master may be deemed injurious to the mind or morals of the apprentice; as for compelling him to labour on the Sabbath; Commonwealth v. St. Germains, 1 Brown. Penn'a Rep. 24. The indentures may of course be vacated by the consent of all parties. Graham v. Graham, 1 Serg. & Rawle, 330. A somewhat anomalous doctrine seems to be held on this subject in Louisiana; but which cannot be said to have no foundation in sense or law. It is, that the contract of apprenticeship is personal and not susceptible of alienation, without the consent of all parties concerned, and consequently its operation ceases on the insolvency as well as on the death of the master, inasmuch as his character and disposition entered into the consideration of the contract. Versailles v. Hall, 5 Miller's Louis. Rep. 266, cited in note to 2d Kent's Com. 266.

Numerous decisions may now be found sanctioning assignments of indentures of apprenticeship, but it seems to be a vexed question whether the assignment will be binding upon the apprentice unless he consents to it. The better opinion is that he is not bound. Commonwealth v. Van Lear, 1 Serg. & Rawle, 248; Commonwealth v. Jones, 3 do. 158; Haley v. Taylor, 3 Dana's Ken. Rep. 222. In Pennsylvania, the enlistment in the army of an apprentice, with the consent of his master, who had been bound by the managers of the Almshouse, was held valid, although the master had

seems that, where there is no custom upon the subject which can be imported into the contract, and the service is under an *entire contract* for a year's service and a year's pay, if the master dies in the middle of the year, the servant is not legally entitled to *any* wages for a broken period of service.

Thus, where(*m*) debt was brought upon a writing, *by which the defendant's testator had appointed the plaintiff's testator to [*112] receive his rents, and promised to pay him one hundred pounds per annum for his service; the plaintiff showed that the defendant's testator died three-quarters of a year after, during which time he served him, and he demanded seventy-five pounds for three-quarters; after judgment for the plaintiff in the Common Pleas, the defendant brought a writ of error, and it was argued that without a full year's service nothing could be due, for that it was in the nature of a condition precedent; that it being one consideration and one debt, it could not be divided; and the Court of Queen's Bench were of that opinion, and reversed the judgment.

Where, however, there is a custom applicable to persons in the situation in which the servant was,—as there is with regard to domestic servants, who are generally considered entitled to wages for the time they serve, though they do not continue in the service during the whole year, the servant would probably be held entitled to recover wages for the period of actual service.(*n*) And it is conceived that in all cases where the contract is not an entire contract for a whole year's service on one side and a whole year's pay on the other, a servant, whose master dies in the middle of a year, might recover, in the common action for wages, his wages for the broken period of service, upon principles similar to those which allow a servant, wrongfully discharged, to treat the contract as rescinded, and sue for his wages for the period of actual service.(*o*)

The executors or administrators of their master are the persons to whom servants must look for payment of their wages after his decease.(1)

It is stated by some authorities,(*p*) that the wages of domestic servants, and of labourers, are entitled to preference over other debts of the deceased; but it is difficult to point out any legal ground on which such preference can be claimed.(*q*)

(*m*) Countess of Plymouth v. Throgmorton, 1 Salk. 65. See Elderton v. Emmens, 6 C. B. 160.

(*n*) See Cutter v. Powell, post, p. 115. (*o*) Ante, p. 99.

(*p*) 2 Bl. Comm. 511, citing 1 Roll. Abr. 927; and see Toller on Exors. 286.

(*q*) 2 Wms. Exors. 822, note (s) 3rd ed. It may be here mentioned, as a caution to servants, that upon the death of their master the only persons entitled to deal with his

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covenanted not to assign the indenture without the consent of the managers, which consent was not given to the enlistment. Commonwealth v. Barker, 5 Binn. 423. The statutes of Massachusetts and New York also authorize such assignments under certain restrictions. Rev. Stat. Mass. 1835; Rev. Stat. New York, vol. ii. p. 156. In Vermont, an apprentice bound by the overseers of the poor, may be assigned without his consent; and if his master die, he may be retained in the service of the administrator with the consent of the overseer. The doctrine in ordinary cases is, that the assignment is not absolutely void, but may be avoided at the pleasure of the infant. Phelps v. Culver, 6 Vt. Rep. 430.

Reeve's Dom. Relat. p. 344–5, note to 2d ed. by Chittenden.

(1) See Phœbe v. Jay, Breese Rep. 207.

[*113] *The subject of legacies to servants, and how far such legacies operate to extinguish the servant's claim for wages, will be treated of hereafter in a subsequent chapter.(r)

When a servant, whose wages are due *periodically*, refuses to perform his part of the contract and serve his master in the manner contracted for, or so conducts himself that the master is justified in discharging him without notice, he is not entitled to be paid *any* wages for that portion of time during which he has served since the last periodical payment of wages;(s) that is to say, if a servant, whose wages are only due yearly, is *rightfully* discharged before the expiration of the year, he could recover nothing for services rendered previous to such discharge. And the same principle would apply to the case of a quarterly, monthly, or weekly hiring. In any of such cases, if the servant fail to perform his part of the contract, or be rightfully discharged at any intervening period between the days when his wages are due,(t) he can recover nothing for the broken period of service. This is upon the principle that the contract was an entire contract, and the performance of the service for the *whole* time agreed upon was in the nature of a condition precedent to the right to recover *any* wages. And it is a general rule,(u) applicable to all contracts, that while a special contract remains unperformed, the party whose part is unperformed cannot sue in indebitatus assumpsit for compensation for what he has done under the contract until the whole is completed.(v)

[*114] *Thus, in an action(w) for wages for work performed by the plaintiff, who was a seaman on board the defendant's ship, during a voyage from Altona to London, where it appeared that the service was under an agreement, by which the plaintiff agreed to serve from Altona to London *and back again*, and there was an express stipulation by which the plaintiff was bound to demand no wages till the conclusion of the voyage: the plaintiff was nonsuited, on the ground that the contract remained unperformed and unrescinded, and the plaintiff should have sued the defendant upon the contract; and the non-suit was held right by the Court of King's Bench.

Upon similar principles, in a variety of cases, servants who have been *rightfully* discharged, and have afterwards sued their late masters for wages, have failed to recover anything.

personal property, are his *legal* personal representatives, that is, his executors, if he has left any; or, if not, his administrators: and that in a recent case, where a housekeeper, on her master's death, without leaving any executors, applied certain cash in the house, and the produce of the sale of some of her master's property, to the payment of the expenses of his funeral and other expenses, without any authority to do so; she was afterwards held liable to an action at the suit of the widow and administratrix for the money so received and applied; Welchman v. Sturgis, 13 Q. B. 552.

(r) Post, ch. 11.

(s) See Dalt. Just. ch. 58, p. 129, where it is said, "If a servant of his own accord shall depart from his master before his time expired, he shall lose all his wages."

(t) See the preceding chapter as to what causes will justify the discharge of a servant.

(u) See cases cited in 2 Smith's L. C. 10, note to Cutter v. Powell.

(v) And he cannot sue the other party specially for non-performance of the contract, unless he has himself performed or been ready to perform his part of it: as has been already shown whilst treating of the action for wrongful dismissal.

(w) Hulle v. Heightman, 2 East, 145, and see 2 Smith's L. C. 11.

Thus, in an action(*x*) brought by a *yearly servant* to a farmer to recover wages for his service from Michaelmas to July, when he was discharged, under circumstances which were held to justify his discharge: it was held, that he could not recover anything. And Lord Ellenborough said, "If the contract be for a year's service, the year must be completed before the servant is entitled to be paid." Lord Tenterden afterwards, on two occasions,(*y*) expressed a similar opinion. And, upon the authority of these cases Lord Denman(*z*) non-suited a servant, who, having been properly discharged, (as was admitted,) afterwards brought an action for wages during a broken period of service; and the non-suit was held right by the Court of King's Bench.(*a*) The principle on which the cases were decided was afterwards(*b*) applied to the case of a clerk to a public company, whose salary had been paid *quarterly*, and who, having been discharged for improper conduct some little time after the quarter day, was held not to be *entitled to recover anything for the period which had elapsed since the last periodical payment of his salary. [*115] In his judgment in that case, Lord Denman said: "Turner v. Robinson, and many other cases, have shown that if a party, hired for a certain time, so conduct himself that he cannot give the consideration for his salary, he shall forfeit the current salary even for the time during which he has served."

And in the recent case of Lilley v. Elwin,(*c*) which was an action by a wagoner and servant in husbandry (who left his work, and was afterwards summoned before a magistrate under the stat. 4 Geo. 4, c. 34, s. 3, and by him discharged from the service) against his master: it was held, that he could not recover wages for the time of his actual service, as he was bound to give a whole year's service before earning any wages, and broke his contract by leaving the service before the year's end.

Similar principles are applicable to cases in which the death of the servant prevents his performing his part of the contract and completing the period of service agreed upon. In such cases the servant's representatives can recover nothing for the broken period of service, unless, indeed, there exist a *custom* in the particular occupation in which the servant was engaged to support the claim to wages for such service, as is the case with regard to domestic servants.

Thus, where(*d*) P., being at Jamaica, subscribed and delivered to C. the following note,—"Ten days after the ship Governor Parry, myself master, arrives at Liverpool, I promise to pay Mr. T. Cutter the sum of thirty guineas, provided he proceeds, continues, and does his duty as second mate in the said ship from hence to the port of Liverpool:" C. went on board, and did his duty from the 31st of July to the 20th of September, when he died, before the ship reached Liverpool: his representatives brought an action for his wages for the period during which he

(*x*) Spain v. Arnott, 2 Stark. 236.
(*y*) Huttman v. Boulnois, 2 C. & P. 510; Atkin v. Acton, 4 C. & P. 208.
(*z*) In Turner v. Robinson, 6 C. & P. 15. (*a*) 5 B. & Ad. 789.
(*b*) Ridgway v. Hungerford Market Company, 3 A. & E. 171.
(*c*) 11 Q. B. 742.
(*d*) Cutter v. Powell, 6 T. R. 320. See 2 Smith's L. C. 1.

had served; but it was held, that C. not having completed the voyage his representatives could not recover any wages. And Ashurst, J., said: "Here the intestate was by the terms of his contract to perform a given duty before he could call upon the defendant to pay him anything; it was a condition precedent, without performing which the defendant is [*116] *not liable. And that seems to me to conclude the question; the intestate did not perform the contract on his part; he was not, indeed, to blame for not doing it, but still, as this was a condition precedent and he did not perform it, his representative is not entitled to recover." And Lawrence, J., added: "With regard to the common case of a hired servant, to which this has been compared, such a servant, though hired in a general way, is considered to be hired with reference to the general understanding upon the subject that the servant shall be entitled to his wages for the time he serves, though he do not continue in the service during the whole year. So, if the plaintiff in this case could have proved any usage that persons in the situation of this mate are entitled to wages in proportion to the time they served, the plaintiff might have recovered according to the usage. But if this is to depend altogether upon the terms of the contract itself, she cannot recover anything."

OF THE MASTER'S DUTY TO SUPPLY FOOD AND MEDICINE TO THE SERVANT—STATUTE 14 & 15 VICT. C. 11.

The duty of a master or mistress to supply food and other necessaries to their servants arises solely from a contract, either express or implied, on their part to do so. And the omission to perform this duty was, till recently, merely a breach of contract, for which they were civilly, but not criminally liable, except in the case of a servant of tender years.(*e*) But at a meeting of all the Judges, (except Lord Kenyon and Rooke, J.,) held 25th of February, 1802, the general opinion was, that it was an indictable offence, as a misdemeanor, to refuse or neglect to provide sufficient food, bedding, &c., to *any infant of tender years unable to provide for and take care of itself*, (whether such infant were child, apprentice, or servant,) *whom a man was obliged by duty or contract to provide for*, so as thereby to injure its health.(*f*)

[*117] A married woman, however, cannot be convicted of a *misdemeanor in neglecting to supply even an infant servant with proper food, unless it be shown that her husband supplied her with food to give the child and she wilfully neglected to give it. The omission to provide food is the omission of the husband, the wife being in the nature of a servant to the husband.(*g*)

In the case of the Sloanes, who were indicted in February 1851, upon a charge of starving and otherwise ill treating their servant girl, who was sixteen years old, the learned Judges(*h*) who tried the case consider-

(*e*) Rex v. Ridley, 2 Camp. 650.
(*f*) See Friend's case, Russ. & Ry. C. C. 22.
(*g*) Rex v. Saunders, 7 C. & P. 277.
(*h*) Coleridge, J. and Cresswell, J.

ing that she was not of *tender years*, that part of the charge was abandoned.(*i*)

In consequence of the great scandal caused by the Sloanes' case, the statute 14 & 15 Vict. c. 11 was passed. By sect. 1 of that statute it is enacted, "That where the master or mistress of any person shall be legally liable to provide for such person, as an apprentice or as a servant, necessary food, clothing, or lodging, and shall wilfully and without lawful excuse refuse or neglect to provide the same, or where the master or mistress of any such person shall unlawfully and maliciously assault such person, whereby the life of such person shall be endangered, or the health of such person shall have been, or shall be likely to be permanently injured, such master or mistress shall be guilty of a misdemeanor, and being convicted thereof, shall be liable to be imprisoned, with or without hard labour, in the common gaol or house of correction, for any term not exceeding three years."

And by sect. 2, the costs of prosecution in any such case may be allowed by the Court before which the indictment shall be tried, to be paid by the treasurer of the county, as in cases under 7 Geo. 4, c. 64.(*k*)

A master is legally bound to provide medical attendance for an apprentice,(*l*) but not for a servant, in case of illness or accident (1) Lord Kenyon, indeed, was of *opinion,(*ll*) (and it was said by Lord Alvanley,(*m*) that he had reason to believe that that was [*118] not a hasty opinion, but formed upon reflection,) that a master was obliged to provide for his servant in sickness and in health, and that he therefore was liable for medicines furnished to his servant while in his service. Not that his servant was at liberty to go abroad and contract debts for medicines, but that *whilst he was under his master's roof*, the master was under a legal as well as a moral obligation to provide the necessary medicines, and to pay for such as were administered to his servant under such circumstances. And Lord Eldon(*n*) seemed disposed to follow Lord Kenyon's opinion. But subsequent decisions have laid down a different doctrine, and it may now be considered as established law, that a master is *not bound* to provide medical advice for his servants, and that it makes no difference whether or not the servant, be living under his master's roof. The first formal decision upon this point was made in the case of Wennell v. Adney,(*o*)

(*i*) The defendants pleaded guilty to the charge of assaulting, &c., the servant, and were punished for *that*.

(*k*) The act also provides, in the subsequent sections, for the keeping of a register and periodical visitation by the guardians or overseers, of all young persons hired or apprenticed from any workhouse or union. See the act printed at length in the Appendix.

(*l*) Rex. v. Smith, 8 C. & P. 153. (*ll*) Scarman v. Castell, 1 Esp. 270.

(*m*) In Wennell v. Adney, 3 B. & P. 252. (*n*) Simmons v. Wilmott, 3 Esp. 93.

(*o*) 3 B. & P. 247. Lord Mansfield had indeed at nisi prius, held, that the master was not legally bound to repay the parish for the cure of his servant; Newby v. Wiltshire, 2 Esp. 739; S. C. 4 Doug. 284. But the case in the text is the first decision in banc, upon the subject.

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(1) See Clark v. Waterman, 7 Verm. R. 76.

which was an action by a surgeon to recover the amount of his bill for medical attendance upon a servant of the defendant, who had his arm broken while driving the defendant's team, and who had been hired by the defendant at the yearly wages of 3*l.* 10*s.* and victuals. The defendant had made no express promise to pay the plaintiff; and it was held, that there was no implied promise on his part to do so, and therefore the plaintiff was nonsuited; and the nonsuit was afterwards held right by the Court of Common Pleas. In giving judgment, Lord Alvanley, C. J., after stating his concurrence with the learned Judge who tried the case, in thinking the defendant not liable, said, that "previous to the case of Scarman v. Castell, there is no authority in the law of England to be found which warrants the position contended for on the part of the plaintiff. I have no doubt whatever, that *parish officers* are bound [*119] to assist where such accidents as these take *place; and that the law will so far raise an implied contract against them, as to enable any person who affords that immediate assistance which the necessity of the case usually requires, to recover against them the amount of money expended." And Heath, J. observed, "I believe that the humanity of Lord Kenyon misled him when he adopted the doctrine upon which he decided the case of Scarman v. Castell. Probably, at the moment, it occurred to him, that if the master was not bound to provide medical assistance for his servant, the latter would be left wholly destitute: but I am perfectly sure *it is more for the advantage of servants that the legal claim for such assistance should be against the parish officers rather than against their masters:* for the situation of many masters who are obliged to keep servants, is not such as to enable them to afford sufficient assistance in cases of serious illness. And Rooke, J. added, "It was left to the humanity of every master to decide whether he will assist his servant according to his capacity or not."

Since the case of Wennall v. Adney, it has never, it is believed, been seriously contended, that any legal liability exists, on the part of the master, to supply medical assistance for his servants; but in the few cases which have happened at nisi pruis, it has usually been contended on the part of the plaintiff, that the master has, by his conduct, rendered himself liable—either by calling in his own usual medical attendant, or by recognising the employment of the medical man called in by the servant. Therefore,(*p*) in an action for the amount of a surgeon's bill, which contained a charge of 7*s.* 6*d.* for attending a servant of the defendant, named Read, who had hurt her ancle in getting over a gate: and also a charge of 12*l.* for attending one Parry, who had acted as wet nurse to two of the defendant's children: the defendant was held *not* liable to pay the former charge, as the plaintiff was not the regular medical attendant of the family, and had been employed by Read without the knowledge of her master or mistress. But the latter charge the defendant was held *liable* to pay; as it appeared that Parry's illness arose from suckling the defendant's youngest child, and his wife knew of the [*120] plaintiff's attendance, but did not express any disapprobation *of it, although it also appeared that the defendant did not know

(*p*) Cooper v. Phillips, 4 C. & P. 581; and see Sellen v. Norman, 4 C. & P. 80.

the plaintiff, and had sent the surgeon who regularly attended his family to see Parry, and had also sent her ten shillings to pay for medicines. Mr. Justice Taunton considering, that his doing so shewed that he considered himself liable to take care of her in that illness, and that it must be taken that the wife had the general superintendence of the house.

It is believed, however, that no case has yet occurred in which the question has arisen in an action by a *servant* against his master, who had agreed to supply the servant with necessary food, whether the master, in *such case*, is bound by his contract to furnish physic to his servant in case of illness. But when the question shall arise the decision of it must depend upon the exact nature of the contract entered into. Sometimes a master engages to supply his servant with necessary victuals; and it may be argued that necessary victuals mean such victuals as may suit the state of health or infirmity in which the servant happens to be,—as if a servant be in need of wine, or victuals of that description, which are given by way of medicine.(*q*)

In the event of illness or accident, however, happening to a pauper, the parish in which it takes place is bound to provide the necessary medical advice and assistance.(*r*) And an overseer neglecting to provide medical assistance, when required, to a pauper labouring under dangerous illness, is indictable, although such pauper is not in the parish workhouse, nor had previously to his illness received or stood in need of parish relief.(*s*)

*OF THE MASTER'S DUTY TO INDEMNIFY THE SERVANT FROM THE CONSEQUENCES OF OBEYING HIS COMMANDS. [*121]

It is also the duty of a master to indemnify his servant from the consequences of his doing, in obedience to his master's orders, any act pursuant to orders which he was bound to obey, or any other act which was either lawful in itself, or which, not being in itself unlawful, might have been either lawful or unlawful, but which the servant was induced by the conduct of his master to believe to be lawful,—as the rule that one wrongdoer cannot sue another for contribution(*t*) would not apply in such cases.(*u*) But it is conceived that a master is not bound to indem-

(*q*) See per Lord Alvanley, in Wennall v. Adney, 3 B. & P. 247.

(*r*) Wennall v. Adney, 3 B. & P. 247; Simmons v. Wilmot, 3 Esp. 91; and see Watling v. Walters, 1 C. & P. 132, as to deputy overseer's liability. And the parish cannot recover the expenses from the master; Newby v. Wiltshire, 2 Esp. 739; S. C. 4 Doug. 284; nor from the parish where the pauper was settled; Atkins v. Banwell, 2 East, 505; Gent v. Tompkins, 5 B. & C. 746, note; nor may a pauper, who has met with an accident, be removed to the place of his settlement during his illness; Rex v. Bury St. Edmonds, 10 East, 25; Rex v. Ludlow, 4 B. & Ald. 660; Tomlinson v. Bentall, 5 B. & C. 738; Paynter v. Williams, 1 C. & M. 810. But where a servant having met with an accident was carried to the nearest house, which was in the next parish, *that* parish was held liable; Lamb v. Bunce, 4 M. & S. 275.

(*s*) Rex v. Warren, Russ. & R. Ch. Cas. 48, note.

(*t*) Merryweather v. Nixon, 8 T. R. 186.

(*u*) Southern v. How, Bridgman's Rep. 126; S. C. Cro. Jac. 468; Adamson v. Jarvis, 4 Bing. 66; Betts v. Gibbons, 2 A. & E. 57; Toplis v. Grane, 5 Bing. N. C. 650; Collins v. Evans, 5 Q. B. 830; Rawlings v. Bell, 1 C. B. 951; Smith's Merc. Law,

nify his servant from the consequences of an act which is malum in se, or which the servant knew to be unlawful, although done by him in obedience to his master's orders, as the servant was not bound to obey his master's orders in such a case; and the master is only bound to indemnify an *innocent* agent. And a master is not bound to indemnify his servant from damage arising in consequence of his acting contrary to his master's orders,—as if a servant entrusted to sell and expressly ordered not to warrant, does warrant, and suffers damage in consequence.(*v*)

[*122] *CHAPTER V.

THE LIABILITY OF A MASTER TO THIRD PERSONS FOR THE ACTS OF HIS SERVANT.

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IN CASES OF CONTRACT.

THE power which a servant possesses of binding his master by contracts entered into in his name is founded upon, or, rather, is the basis of, the general law of principal and agent. It is only upon the ground that a servant is the agent of his master, that a master can, in any case, be made liable upon contracts entered into by his servant; and the principle on which the liability of the master upon such contracts depends is, that the act of the servant is, in fact, the act of the master,—the maxim being, qui facit per alium facit per se.(*a*)(1)

And, since many persons, such as infants and married women, who are incapacitated in general to do acts on their own behalf which will be absolutely binding upon them, may nevertheless, *as agents* for others, do acts which will be binding upon the persons for whom they act,(*b*) it [*123] would be no objection to the liability of a *master on the contract of his servant that the servant was an infant or a married(*c*) wo-

115; Story on Ag. sect. 339; and see also the following cases, in which the question has been, whether an action for money paid would lie by a person employed against his employer; Britain v. Lloyd, 14 M. & W. 762; Bayliffe v. Butterworth, 1 Exc. 425; Bayley v. Wilkins, 7 C. B. 886; Westrop v. Solomons, 8 C. B. 345; Lewis v. Campbell, ibid. 541. As to costs, see Garrard v. Cottrell, 10 Q. B. 679.

(*v*) See per Houghton, J., in Southern v. How, Cro. Jac. 471.

(*a*) See Bac. Abr., tit. "Master and Servant," K.

(*b*) Co. Litt. 52 *a*; Bac. Abr., tit. "Authority," B.; Story on Ag. sects. 7 and 8, where see the rule of the civil law. See also Emerson v. Blonden, 1 Esp. 142; Palethorp v. Furnish, 2 Esp. 511, note; Prestwick v. Marshall, 7 Bing. 565; Lindus v. Bradwell, 5 C. B 583.

(*c*) As to the effect of a contract made by a married woman as agent, after the termination of her authority to act as agent, see Smout v. Ilbury, 10 M. &. W. 1.

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(1) See 2 Kent's Comm. p. 279, and notes to 7th ed.

man at the time the contract was entered into, provided the contract was in other respects binding upon the master.

But in order that a contract made by a servant may be binding on his master, it must be within the scope of the authority entrusted to the servant since no agent can bind his principal beyond the scope of his authority.

It therefore becomes necessary to inquire what is the scope of authority entrusted to a servant with regard to binding his master upon contracts. The answer to this question involves the consideration of several others; for the authority of a servant to contract in his master's name may be given either *expressly*, by deed, writing, or word of mouth, *or by implication*, from the conduct of the master.(*d*) And in either of those cases it may be *general* (*i. e.*, not unqualified, but to act in all cases of a particular nature,) or it may be *special*, *i. e.*, to act in one particular instance.(*e*) Again in any of the before mentioned cases the authority given may be either *limited* by precise instructions, or *unlimited*.(*f*)

When authority to contract in his master's name is given to a servant by deed or writing, but little difficulty is likely to arise in ascertaining the extent of his authority, except, perhaps, from some ambiguity in the expressions used in the instrument conferring it.(*g*) In such cases it is the duty of the court to explain them, and they will be construed strictly.(*h*) Letters containing private instructions as to the mode in which the authority given is to be exercised (as distinguished from the instrument conferring the authority), being documents of a less formal kind, will receive in general a more liberal construction. But where a servant, intending to act in conformity with his instructions, has *acted in a manner contrary to his master's intention, the Court [*124] will, as between him and his master, construe them in a manner favourable to the servant and against the master, if they are capable of such a construction, upon the principle that verba fortius accipiuntur contra proferentem.(*i*)

The effect of express verbal instructions to the servant will be considered hereafter, as it depends upon whether the servant has a general authority to act for his master, or is merely specially employed on one particular occasion.

Where a master has *recognised and adopted* a contract entered into in his name by his servant, he will be equally liable upon it as if he had previously expressly authorized the servant to enter into it,—the maxim in such cases being(*k*) omnis ratihabitio retrotrahitur et mandato priori æqui-

(*d*) F. N. B. 120, G.

(*e*) Whitehead v. Tucket, 15 East. 408; Paley on Ag. 199.

(*f*) Ibid; Paley on Ag. 2.

(*g*) Smith's Merc. Law, 4th ed. 116; and see Attwood v. Munnings, 7 B. & C. 278; Withington v. Herring, 5 Bing. 442; Heraud v. Leafe, 5 C. B. 157.

(*h*) Howard v. Baillie, 2 H. Bl. 618; Murray v. East India Company, 5 B. & Ald. 211; Attwood v. Munnings, ubi supra; Paley on Ag. 192; and see Flemyng v. Hector, 2 M. & W. 172.

(*i*) Story on Ag. sect. 74, 75.

(*k*) Co. Litt. 207 a; Story on Ag. section 239, et seq., where see the rule of the

paratur. "This doctrine," said Lord Cranworth, in Bird v. Brown,(*l*) "is intelligible in principle and easy in its application when applied to cases of contract. If A. B. unauthorized by me, makes a contract on my behalf with J. S., which I afterwards recognise and adopt, there is no difficulty in dealing with it as having been originally made by my authority. J. S. entered into the contract on the understanding that he was dealing with me, and when I afterwards agreed to admit that such was the case, J. S. is precisely in the condition in which he meant to be; or, if he did not believe A. B. to be acting for me, his condition is not altered by my adoption of the agency, for he may sue A. B. as principal at his option, and has the same equities against me if I sue which he would have had against A. B."(*m*)

A master, however, cannot in this manner render himself liable upon a contract made by a servant, unless the servant, at the time he entered into it, assumed to act *as his agent*.(*r*) Nor can he thus avail himself by [*125] *adoption of an act done in his name, which, in order to be valid at all, ought to have been valid *at the time it was done*. Such, for instance, as a notice to quit; since such a notice to be good must be one that the party to whom it is given may act upon it immediately.(*o*) It is conceived, however, that even if such a notice were given in his master's name, by a servant not authorized to give it, to a tenant from year to year, and the master ratified it, and gave notice to the tenant of such ratification *before the commencement* of the last half of the tenancy, such ratification would render the notice valid;(*p*) though that might perhaps more properly be called a *fresh notice* to quit by the master himself.

Where a master has *admitted* his liability upon a contract made by his servant, the weight due to that admission depends on the circumstances under which it was made.(*q*) If no other person has been induced by it to alter his condition, the master is not concluded or estopped by it, but may prove it to have been mistaken or untrue.(*r*)

Where the authority of a servant to bind his master upon contracts arises merely by implication, the general rule is, that *the authority of a servant is co-extensive with his usual employment, and the scope of his authority is to be measured by the extent of his employment*.(*s*) For a master who accredits a servant by employing him must abide by the effects of that credit, and will be bound by contracts made with innocent third persons in the seeming course of that employment, and on the faith of that credit,—whether he intended to authorize them or not, or even if

Roman law, which was similar; and see Saunderson v. Griffiths, 5 B. & C. 909; Vere v. Ashby, 10 B. & C. 298; Maclean v. Dunn, 4 Bing. 722. (*l*) 4 Exc. 798.

(*m*) There is more difficulty in the application of this doctrine in cases of tort; as to which see post.

(*n*) Wilson v. Tumman, 6 M. & G. 236; 4 Inst. 317; Walker v. Hunter, 2 C. & B. 334. It was a maxim of the canon law, "Ratum quis habere non potest, quid ipsius nomine non est gestum;" see note (*a*), to 6 M. & G. 239.

(*o*) Doe v. Walters, 10 B. & C. 626; Doe v. Goldwin, 2 Q. B. 146; and see per Parke, B., in Buron v. Denman, 2 Exc. 188.

(*p*) See Bird v. Brown, 4 Exc. 799.

(*q*) Newton v. Belcher, 12 Q. B. 934.

(*r*) Newton v. Liddiard, 12 Q. B. 925. See Heane v. Rogers, 9 B. & C. 577; Pickard v. Sears, 6 A. & E. 474.

(*s*) Smith's Merc. Law, 116; Paley on Ag. 162.

he expressly, though privately, forbad them; it being a general rule of law, founded on natural justice, that where one of two innocent persons must suffer by the frauds of a third, he who enabled that third person to commit the fraud should be the sufferer.(*t*) *Upon this principle, where a servant usually buys for his master upon credit, and the [*126] master is in the habit of paying for goods, so purchased, the master is liable to pay for any goods of a similar nature which the servant may obtain upon credit, even though, in a particular instance, the master furnish the servant with money to pay for the goods, and the servant embezzle the money: or even if the servant, after he has been discharged, pledge his master's credit, unless the party giving credit knew that the servant was discharged.(*u*)

Thus, where(*v*) the defendant, who was a considerable dealer in iron, and known to the plaintiff as such, though they had never dealt together before, sent a waterman to the plaintiff for iron, on trust, and paid for it afterwards. He sent the same waterman a second time with the ready money, who received the goods, but did not pay for them, the defendant was held liable, "for the sending him upon trust the first time, and paying for the goods, was giving him credit so as to charge the defendant upon the second contract.(*w*)

So where a master(*x*) used to give his servant money every Saturday to defray the charges of the foregoing week. The servant kept the money; yet, per Holt, C. J., the master is chargeable,—for the master, at his peril, ought to take care what servant he employs, and it is more reasonable that he should suffer for the cheats of his servant than strangers or tradesmen.

*Again, where a gentleman(*y*) kept a book with his coachman, in which were entered the articles procured by, and the [*127] sums advanced to him; but there did not appear to be any connexion between the sums advanced and the demands he was to pay: the gentleman was held liable to pay for hay and straw delivered for the use of his horses, although he had given the coachman money to pay the bills, which he had embezzled.

Upon similar principles, the owner of a sawmill was held(*z*) bound by a contract entered into by his foreman to furnish the plaintiff with a large quantity of Scotch fir staves; as a foreman employed to conduct a busi-

(*t*) Hern v. Nicholls, 1 Salk. 289; Baring v. Corrie, 2 B. & Ald. 143. In Fitzherbert v. Mather, 1 T. R. 16, Buller, J., said, "It is the common question every day at Guildhall when one of two innocent persons must suffer by the fraud or negligence of a third, which of the two gave credit."

(*u*) Nixon v. Brohan, 10 Mod. 109; Anon. 1 Show. 95; Aischeombe v. Hundred of Snelholme, Holt, 460; —— v. Harrison, 12 Mod. 346; Sir Robert Wayland's case, 3 Salk. 234; Anon. 12 Mod. 564; Boulton v. Arlsden, 3 Salk. 234; S. C. 1 Ld. Raym. 225.

(*v*) Hazard v. Treadwell, 1 Str. 506.

(*w*) See, however, Todd v. Robinson, Ry. & M. 217; Gilman v. Robinson, Ry. & M. 226; S. C. 1 C. & P. 642. A general agency to order goods could hardly be implied from a single recognised dealing. In most cases it would be a question for a jury whether the defendant *held out* the servant as his agent for the purpose of ordering the goods in question.

(*x*) Sir R. Wayland's case, 3 Salk. 234; and see Miller v. Hamilton, 5 C. & P. 433.

(*y*) Rusby v. Scarlett, 5 Esp. 76.

(*z*) Richardson v. Cartwright, 1 Carr. & K. 328.

ness like that in which the defendant was engaged, must be taken to have a general authority to bind his master by such contracts.

The principle of presumptive agency, on which these cases were decided, has been extended to cases in which the person who assumed to act as servant was not really servant, but was considered to have been *held out* as servant by the act of the master.

Thus, a merchant has been held bound by a payment in the usual course of business, to a person found in his counting-house, and appearing to be entrusted with the conduct of the business there, though it turned out that the person was never employed by him, and the money never came to his hands; "For," said Lord Tenterden, "the debtor has a right to suppose that the tradesman has the control of his own premises, and that he will not allow persons to come there and intermeddle in his business without his authority."(*a*) And so a tender to a person, probably a chief clerk, in the office of an attorney, who refused to accept the amount tendered as insufficient, has been held good,—being equivalent to a tender to the attorney himself.(*b*)

Again, although "it may be admitted that an authority to draw, does not import, in itself, an authority to indorse bills; still, the evidence of [*128] such authority to *draw is not to be withheld from the jury, who are to determine, on the whole of the evidence, whether such authority to indorse exists or not."(*c*) And therefore, where the defendants' confidential clerk had been accustomed to draw cheques for them, and in one instance, at least, they had authorized him to indorse, and in two other instances had received money obtained by his indorsing in their names, a jury were held warranted in inferring therefrom that the clerk had a general authority to indorse.(*d*)

And a man has been held liable(*e*) upon a guaranty given in his name by his son, who had signed for his father in three or four instances, and had accepted bills for him.

Where a servant is employed to transact business, and has *no particular orders* with reference to the manner in which the business is to be transacted, he is considered as invested with all the authority necessary for transacting the business entrusted to him, and which is *usually* entrusted to agents employed in matters of a similar nature.(*f*) In this respect there is no distinction, whether the authority be general or special, express or implied. In each case it embraces the appropriate means to accomplish the desired end.(*g*) Thus, a servant sent, without money, to buy goods, has implied authority to pledge his master's credit.(*h*)

(*a*) Barrett v. Deere, Moo. & M. 200. See Rex v. Thorley, 1 Moo. Cr. Cas. 343.

(*b*) Wilmott v. Smith, Moo. & M. 238. In Moffat v. Parsons, 5 Taunt. 307, tender of payment to a servant, who, in pursuance of his master's orders, refused to accept it, was held a good tender to the master.

(*c*) Per Tindal, C. J., Prescott v. Flinn, 9 Bing. 22.

(*d*) Prescott v. Flinn, ubi supra; and see Barber v. Gingell, 3 Esp. 60; Llewellyn v. Winckworth, 13 M. & W. 598.

(*e*) Watkins v. Vince, 2 Stark. 368.

(*f*) Story on Ag. sect. 60; and see per Parke, B. in Cox v. Midland Counties Railway Company, 3 Exc. 278.

(*g*) Story on Ag sect. 85, 97; Howard v. Baillie, 2 H. Bl. 618.

(*h*) Tobin v. Crawford, 9 M. & W. 718.

Upon this principle it was held, in a very old case,(*i*) that if a goldsmith make plate, wherein he mingles dross, so that it is not according to the standard, and send his servant to a fair to sell it, who sells it for good plate according to the standard; an action upon the *case lies against the master. And so a horse-dealer has been held liable [*129] upon the warranty of his servant entrusted to sell, where the warranty was part of the transaction of sale.(*k*)

And so, also, where a person, who was not a horse-dealer, sent his servant with his horse to Tattersall's for sale, with instructions to warrant him sound, and he warranted him free from vice, the master was held liable upon the warranty, although it was contended on his behalf that the servant was but a special agent, and he having exceeded his authority the master ought not to be bound. "But," said Lord Ellenborough, C. J., "the master having entrusted the servant to sell, he is entrusted to do all that he can to effectuate the sale; and if he does exceed his authority in so doing, he binds his master."(*l*) And in another case,(*m*) where the defendant's servant, who was entrusted to sell and receive the price, sold a horse at a fair to the plaintiff and warranted him sound, the defendant was held liable for a breach of the warranty; and Lord Ellenborough said, "If the servant was authorized to sell the horse and to receive the stipulated price, I think he was incidentally authorized to give a warranty of soundness. It is now most usual, on the sale of horses, to require a warranty: and the agent who is employed to sell, when he warrants the horse, may fairly be presumed to be acting within the scope of his authority. This is the common and usual manner in which the business is done, and the agent must be taken to be vested with power to transact the business with which he is entrusted in the common and usual manner. I am of opinion, therefore, that if the defendant's servant warranted this horse to be sound, the defendant is bound by the warranty.(*n*)

But although a warranty by a servant entrusted to sell, given at the time of sale and *as part of the transaction of selling*, *will bind the master, yet an acknowledgment to that effect made at another [*130] time would not bind him.(*o*) And where there had been a *previous bargain* between the plaintiff and the defendant, who was a horse-dealer, for the sale of a horse, and the defendant's servant, being sent to deliver the horse and receive the price, gave a warranty, the defendant was held not liable.(*p*) And so a master has been held not bound by an alteration in

(*i*) Southern v. Howe, Cro. Jac. 471; and see Hern v. Nicholls, 1 Salk. 289. As to how far the master is affected by fraud of his servant, see Cornfoot v. Fowke, 6 M. & W. 358; Fuller v. Wilson, 3 Q. B. 58; Jones v. Downman, 4 Q. B. 235, note; Downman v. Williams, 7 Q. B. 103; Story on Ag. sect. 264.

(*k*) Fenn v. Harrison, 3 T. R. 760; Helyear v. Hawke, 5 Esp. 72. Woodin v. Burford, 2 Cr. & M. 391.

(*l*) Helyear v. Hawke, 5 Esp. 72. (*m*) Alexander v. Gibson, 2 Campb. 555.

(*n*) And if an agent entrusted to sell and warrant, do sell and warrant, and receive the money, but afterwards, in consequence of the goods sold not answering the warranty, return the money to the purchaser, the principal cannot treat the price as money had and received to his use by the agent; Murray v. Mann, 2 Exc. 538.

(*o*) Helyear v. Hawke, 5 Esp. 72, supra; Peto v. Hague, 5 Esp. 135; Allen v. Dunstone, 8 C. & P. 760.

(*p*) Woodin v. Burford, 2 Cr. & M. 391.

a warranty made by a servant sent to receive the price.(*q*) These two last mentioned cases, however, depend upon the general rule, that *an implied authority cannot be extended to collateral transactions.* Thus, though a clerk, apprentice, or shopman may have an implied authority to receive money paid in the usual course of business, you could not from that infer an authority to receive payments *out* of the usual course of business, as deposit on a wager, payment of a mortgage, legacy, or the like.(*r*) So a clerk who has authority to receive cash across the counter, has not authority to receive payments by cheque by post.(*s*) So a traveller, who receives orders for goods from his employer's customers in the country, is authorized to receive payment for them in money, but not in other goods.(*t*) So in an action against pawnbrokers(*u*) to recover plate deposited with them upon a mortgage, out of the usual course of business, an admission by a shopman of the defendants that they had the plate was held not admissible as evidence against them; for the transaction was not a transaction in the business of a pawnbroker, but a loan as by any other lender of money at 5*l.* per cent., and there was no evidence to show the agency of the shopman in private transactions unconnected with the business of the shop. And Tindal, C. J., said: "If the transaction out of *which this suit arises had been one in the ordinary [*131] trade or business of the defendants as pawnbrokers, in which trade the shopman was agent or servant to the defendants, a declaration of such agent that his master had received the goods *might*, probably, have been evidence against the master, as it *might* be held within the scope of such agent's authority to give an answer to such an inquiry made by any person interested in the goods deposited with the pawnbroker. In that case, the rule laid down by the Master of the Rolls in the case of Fairlie v. Hastings,(*v*) which may be regarded as the leading case on this head of evidence, directly applies."

Upon similar principles it is, that although an entry made at the time when the facts recorded took place by a deceased clerk or other servant in the usual course of business, is evidence, after his decease, of the facts stated in such entry, yet if other facts, not usually stated in entries of a similar nature, happen to be mentioned in making a particular entry, it is not evidence of those facts.(*w*)

Moreover the *implied power* of a servant to bind his master upon contracts relating to matters within the usual scope of his employment is *not increased by the emergency* of any particular occasion.(*x*) And there-

(*q*) Strode v. Dyson, 1 Smith, 400.

(*r*) Saunderson v. Bell, 2 Cr. & M. 304; and see Sykes v. Giles, 5 M. & W. 545, where it was held, that an auctioneer *expressly* authorized by the conditions of sale to receive a deposit, had no implied authority to receive the residue of the purchase money.

(*s*) Kaye v. Brett, 5 Exc. 269. (*t*) Howard v. Chapman, 4 C. & P. 508.

(*u*) Garth v. Howard, 8 Bing. 451; S. C. 5 C. & P. 346.

(*v*) 10 Ves. 128; and see on this point Story on Ag. § 136; 1 Ph. on Ev. 382; Price v. Marsh, 1 C. & P. 60; Jones v. Hart, Ld. Raym. 738; S. C. Salk. 441.

(*w*) Chambers v. Bernasconi, 1 C. M. & R. 347. See Price v. Earl of Torrington, Salk. 285; S. C. 1 Smith's L. C. 139; 1 Ph. on Ev. ch. 7, sect. 8, where all the prior cases are stated and commented on. See also Reg. v. Dukinfield, 11 Q. B. 678.

(*x*) Story on Ag. sect. 87.

fore,(*y*) where a mining company fell into difficulties in consequence of the calls not being paid up, and the agent, from want of funds, was unable to pay the labourers, who applied to the magistrate and obtained warrants of distress upon the materials belonging to the mine; whereupon the agent borrowed money upon the credit of the company, and paid the wages: It was held, that he had no implied authority to do so. Although there were circumstances in the case from which a jury might have inferred an express authority to borrow money for the purposes of the mine. So a station master or other servant of a railway company has no implied authority, *in case of accident, to bind the company, by calling in a surgeon to attend on passengers, for the [*132] power to enter into such a contract is not incident to his employment.(*z*)

It makes no difference in *the master's* liability that the contract is made in the *servant's name*, if in reality he were acting as agent for his master in making the contract. For parol evidence is always necessary to shew that the party sued is the person making the contract and bound by it. Whether he does so in his own name, or in that of another, or in a feigned name, and whether the contract be signed by his own hand or by that of an agent, are inquiries not different in their nature from the question, who is the person who has just ordered goods in a shop. If he is sued for the price, the contract is not varied by appearing to have been made by him in a name not his own.(*a*)

And so, if a landed proprietor send his steward habitually to the neighbouring fairs and markets, to make sales and purchases for him in matters connected with the management of his estate, and the steward makes all these contracts in his own name, but is universally known to have no land of his own, and to be acting solely for his employer, by his direction, and on his credit; the steward's intention to make himself the owner of articles bought on one particular occasion in the course of the same dealing, could not deprive the vendor of his recourse against the master.(*b*)

And, since the nature of the usual employment of a servant is the measure of his implied authority, it follows that that authority can neither be limited by the *private instructions* of the master, nor controlled by any secret *agreement between him and his servant. If this [*133] could be done, in what a perilous predicament would the world stand in respect of their dealings with persons who may have secret communications with their principal. There would be an end of all dealing but with a master.(*c*) Should the servant deviate from his master's orders, or be guilty of a breach of any secret agreement between himself

(*y*) Hawtayne v. Bourne, 7 M. & W. 595; and see Ricketts v. Bennet, 4 C. B. 686.

(*z*) Cox v. Midland Counties Railway Company, 3 Exc. 268.

(*a*) Per Lord Denman, C. J., in Trueman v. Loder, 11 A. & E. 594, 595; and see Thompson v. Davenport, 2 Smith's L. C. 225, 226; Lindus v. Bradwell, 5 C. B. 583. The general rule with regard to contracts made by agents is, that the agent may sue or be sued in respect of his privity, and the principal in respect of his interest. See Sims v. Bond, 5 B. & Ad. 389. Where, however, a servant or other agent has signed a written contract in his own name, he cannot give parol evidence to *discharge himself* from liability upon the contract; Higgins v. Senior, 8 M. & W. 834.

(*b*) See per Lord Denman, in Trueman v. Loder, 11 A. & E. 593.

(*c*) 10 Mod. 110.

and his master, he will be accountable to his master for any loss he may sustain thereby, but third persons cannot be affected by any limitation of the servant's authority not communicated to them.(*d*) In such cases, however, it is material to bear in mind the distinction before adverted to between a *special* and a *general* authority, ("the latter of which does not import any unqualified authority, but that which is derived from a multitude of instances, whereas the former is confined to an individual instance,"(*e*) as the legal effect of secret instructions is very different in the two cases. The difference cannot be more clearly stated than in the words of Mr. Smith in his Compendium of Mercantile Law. He says,(*f*) "The authority of a general agent to perform all things usual in the line of business in which he is employed, cannot be limited by any private order or direction not known to the party dealing with him. But the rule is directly the reverse concerning a particular agent, *i. e.* an agent employed specially in one single transaction, for it is the duty of the party dealing with such a one to ascertain the extent of his authority, and if he do not, he must abide the consequences."(*g*)

A servant may be regarded as the general agent of his master for all purposes within the scope of his employment,—if employed for any unusual purpose, he may be looked upon as the special agent of his master.(*h*) [*134] *Thus, for instance, if a man were in the habit of paying for hay and straw purchased by his groom, the groom might be regarded as his general agent for the purchase of a reasonable quantity of hay and straw, and the master would be liable to pay for such hay and straw purchased by the groom, even if, in a particular instance, the groom acted contrary to his master's orders. But such a groom could not be looked upon as the general agent of his master, so as to render him liable to pay for *anything else* the groom might choose to buy in his master's name, the obtaining other things not being within the scope of his employment. If he were sent by his master, with money, to purchase beer or wine, he would be a special agent for that occasion; and if the person of whom he bought it, chose to let him take it away without payment, and without ascertaining that he had authority to pledge his master's credit, he must abide the consequences; the master would not be liable.

Bearing, therefore, this distinction in mind, it may be stated as a general rule, that wherever a master has, by his conduct, held out his servant as his general agent, whether in all kinds of business, or in transacting business of a particular kind, the master will be bound by the act of his

(*d*) Paley on Ag. 199; 1 Pothier on Oblig., by Evans, 79, note. See also ibid. 447, 448, note.

(*e*) Per Lord Ellenborough in Whitehead v. Tucket, 15 East, 408, and see Paley on Ag. 199.

(*f*) Smith's Merc. Law, 119. See Story on Ag. sect. 126, and note (2) to sect. 127; Hawken v. Bourne, 8 M. & W. 710.

(*g*) Mr. Justice Story, after quoting the words in the text, adds, "This is true if the agent is not held out as possessing a more enlarged authority;" Story on Ag. sect. 126, note (2).

(*h*) The nature and extent of a servant's implied authority must however, as is obvious, frequently involve questions fit for the consideration of a jury. See Smith's Merc. Law, 117; Dyer v. Pearson, 3 B. & C. 38; Todd v. Robinson, Ry. & M. 217; Gillman v. Robinson, Ry. & M. 226; Barnett v. Lambert, 15 M. & W. 493; Reynell v. Lewis, 15 M. & W. 517; Williams v. Pigott, 2 Exc. 201.

servant, if within the scope of his usual employment, notwithstanding the servant has acted contrary to his master's orders.

Thus, where a master(*i*) sent his servant, *who was used to transact affairs of that nature for him*, on Saturday, with a note drawn on Sir S. E., with orders to get from Sir S. E. either bank bills or money, and turn them into Exchequer notes; but the servant, to save himself time and trouble, went to B., and prevailed with him to give him a bank bill for the note upon Sir S. E., and then, in pursuance of his master's orders, invested it in Exchequer notes, which he brought to his master, not letting him know but that he had gone to *Sir S. E. Sir S. E. failed upon the Monday following. The question was, upon whom the [*135] loss should fall, B. or the master. And the whole Court was of opinion, that the master was chargeable—and he only, for a servant, by transacting affairs for his master, does thereby derive a general authority and credit from him; and if this general authority should be liable to be determined for a time by any particular instructions or orders, to which none but the master and servant are privy, there would be an end of all dealing but with the master.

Upon similar grounds rests the distinction, that if a horse-dealer or a person keeping livery stables, having a horse to sell, expressly direct his servant not to warrant him, and the servant do nevertheless warrant him, still the master would be liable upon the warranty, because the servant was acting within the general scope of his authority, and the public cannot be supposed to be cognizant of any private conversation between the master and servant;(*k*) but if the owner of a horse were to send a stranger to a fair with express directions *not to warrant* the horse, and the latter acted contrary to the orders, the purchaser could only have recourse to the person who actually sold the horse, and the owner would not be liable on the warranty, because the servant was not acting within the scope of his authority.(*l*)

Upon the same principle, a gentleman, who by an agreement with his groom allowed him five guineas a year, for which he was to keep the horses shod, was held, nevertheless, to be liable to pay a farrier's bill for shoeing his horses, as it did not appear that the farrier knew of the agreement; and Lord Kenyon said, that unless the farrier knew of the agreement and expressly trusted the groom, it was no defence; for a tradesman has nothing to do with any private agreement between the *master and servant."(*m*) And where(*n*) a gentleman contracted with his [*136] coachman, at 220*l.* a year, to provide horses and his own livery, and everything connected with the carriage; but the coachman went in his master's

(*i*) Nickson v. Brohan, 10 Mod. 109. See Ward v. Evans, 2 Salk. 442; 6 Mod. 36; 2 Ld. Raym. 928; Thorold v. Smith, 11 Mod. 71, 87.

(*k*) Fenn v. Harrison, 3 T. R. 760; Pickering v. Busk, 15 East, 45. See Story on Ag. sect. 132. In note (4), that learned author says, "In America livery stable keepers are not understood to give their servants any general authority to sell their horses."

(*l*) Ibid. But if the master is unwilling to adopt a warranty given by his servant under such circumstances, he is bound to take back the horse and return the money, if paid. To hold otherwise would be to allow him to take advantage of his servant's fraud. See per Lord Abinger, in Cornfoot v. Fowke, 6 M. & W. 381.

(*m*) Precious v. Abel, 1 Esp. 350. (*n*) Rimell v. Sampayo, 1 C. & P. 255.

livery to the plaintiff's stables, and represented that he wanted a pair of job horses for his master's carriage, and an agreement was made with him at ten guineas a month, whereupon he took the horses, and his master used them, and the plaintiff then sued the master for four months' hire : it was held not necessary for the plaintiff to prove that the coachman acted by his master's authority, as he had used the horses ; and Littledale, J., said : "If the coachman made the contract in his own name, and represented to the plaintiff the agreement between himself and his master, of course, under such circumstances, the plaintiff cannot recover; but if he made no such repretation of any agreement between himself and his master, I think that by the master sending him forth into the world *wearing his livery* to hire horses, which he, the master, afterwards uses, knowing of whom they were hired, and yet not sending to ascertain if his credit had been pledged for them, an implied authority is given, and the master is bound to pay the hire. A master may be prevented by business or want of time from making a bargain himself, and may send his servant, and provided the business be within *the regular department of the servant* the master is clearly liable." The jury, however, having found that there was no evidence of any direct application to the master on the part of the plaintiff, found a verdict for the defendant.(*o*)

If a third party, dealing with a servant on behalf of his master, know of the private agreement or instructions given by the master to his servant, he cannot, of course, charge the master upon any contract contrary to that agreement.(*p*) Accordingly, where(*q*) the defendant sent his*son [*137] to obtain from the plaintiff a horse which he had agreed to sell to the defendant, and the plaintiff knew that the son was instructed only to take the horse *if* warranted, but the son took it without a warranty : it was held, that the defendant was not liable to pay for the horse, which did not answer the warranty agreed to be given.

But where a *servant* is employed by his master to act for him in a single transaction, he must be regarded as the special agent of his master; and in such case it is incumbent upon every one dealing with him, who wishes to charge his master upon his contracts, to inquire into the extent of his authority, as, should he exceed it, his master will not be bound.

And, therefore, where(*r*) the plaintiff sent his servant to receive 60*l.* from B., and B. desired E., who owed him money, to strike off 60*l.* from his debt and pay the plaintiff's servant; E. accordingly credited himself with 60*l.* in account with B., but instead of giving the plaintiff's servant money gave him a goldsmith's note, which the servant accepted as payment; it was held, that the plaintiff was not bound by the act of the servant in receiving the note instead of money.

Again, where(*s*) the defendant drew a cheque in favour of a creditor,

(*o*) See Hiscox v. Greenwood, 4 Esp. 174, where a servant having acted beyond the scope of his employment, Lord Ellenborough thought the tradesman, not having inquired of the master, could not charge him.

(*p*) Howard v. Braithwaite, 1 Ves. & B. 209.

(*q*) Jordan v. Norton, 4 M. & W. 155. In this case, however, it will be observed, that the son was a special agent, into whose authority the party dealing with him is bound to inquire.

(*r*) Ward v. Evans, 2 Ld. Raym. 928 ; S. C. Salk. 442.

(*s*) Waters v. Brogden, 1 Y. & J. 457.

and gave it to his own farm bailiff (who bought and sold cattle for him) with instructions to deliver it to the creditor in whose favour it was drawn, but the bailiff at the request of the creditor, got it discounted by the plaintiff (a banker at some distance) and gave the money to the creditor: some days afterwards, the bankers on whom the cheque was drawn failed, and the plaintiff having omitted to present the cheque to them, brought an action against the defendant for the amount; but Alexander, C. B., was of opinion that the defendant was not bound by the act of his farm bailiff, who had no authority to act as he had done.

So, as we have seen, if the owner of a horse send a stranger to a fair, with express directions not to warrant the horse, and the latter act contrary to the orders, the purchaser could only have recourse to the person who actually sold the horse, and the owner would not be liable on the warranty, because the servant was a special *agent, and was not acting within the scope of his authority.(*t*) [*138]

And where a person dealing with an agent has notice either from the mode in which the authority is exercised, or it would seem in any other manner, that the agent is acting under a *special* authority, as, for instance where a bill of exchange is accepted or indorsed by a clerk or cashier, "per procuration" of A. B. (the master,) C. D. (the agent or servant,) he is, a fortiori, bound to inquire whether or not the authority has been properly followed; and if he do not make such inquiries, and it turn out that the party exceeded his authority, he must suffer for his temerity.(*u*)

Therefore, where(*v*) the manager of a banking company, who had authority to draw, accept and indorse bills on account *and for the benefit* of the company, indorsed a bill for the accommodation of one G., "per procuration of the company," and signed his name: it was held, that the company were not bound by such indorsement. And Coltman, J., said, "Any house may allow a clerk to indorse bills of exchange in the name and on account of the firm, and so give currency to them, notwithstanding any secret limitation of his authority. If this banking company had been in the habit of allowing their cashier or manager to indorse bills on their behalf, that would have imported a general authority, and the public would not have been bound to inquire into the circumstances, or the precise extent of such authority. But in every instance the indorsement, *by the form of it, bears an intimation* to the public that the manager acts under a special authority; and, therefore, the persons into whose hands the bills might come were bound to see that the authority was properly pursued."

If, upon inquiry into the authority of such an agent, it should turn out that he is acting under a *written* authority, parties dealing with him should call for the production of the authority, for should the agent exceed his authority, his principal will not be bound.(*w*) This *rule, indeed, applies equally to the case of a general agent. [*139]

If, however, the act assumed to be done is within the authority given (in ascertaining which the authority must be *strictly* construed,)(*x*) the

(*t*) Fenn v. Harrison, 3 T. R. 760. See Paley on Ag. 202.

(*u*) Jordan v. Norton, 4 M. & W. 155. (*v*) Alexander v. Mackenzie, 6 C. B. 766.

(*w*) Attwood v. Munnings, 7 B. & C. 278; Story on Ag. sect. 72; and see the American case of North River Bank v. Aymar, 3 Hill. R. 262, there quoted.

(*x*) Attwood v. Munnings, ubi supra; Howard v. Baillie, 2 H. Bl. 618.

principal will be bound, although the act done may be in violation of private instructions as to the mode of executing the authority. With such instructions third parties have nothing to do.(*y*) It is, therefore, important to bear in mind the distinction between the two, although it is not in all cases easy to distinguish the one from the other.

But where *a master has not*, either expressly, or by implication from a course of dealing, *authorized his servant* to pledge his credit, his servant cannot, by so doing, render him liable to pay for goods so obtained.

Thus,(*z*) where the defendant contracted with the plaintiff to serve him with meat at a certain price *for ready money*, and the cook was accustomed to order the meat, and when the bill amounted to a few shillings, or a guinea, used to pay it; generally on Monday morning, and the defendant always gave her money to pay; which course of dealing continued for a long time, till at last the defendant got a cook who embezzled the money: it was held, that the defendant was not liable, and Lord Kenyon, C. J., said, "Nothing could be clearer than that where a man gives his servant money to pay for commodities as he buys them, if the servant pockets that money the master will not be liable to pay it over again: but if the master employs his servant to buy things on credit, he will be liable to whatever extent the servant shall pledge his credit."

And so where(*a*) the defendant dealt with the plaintiff for the porter used in his family, and was in the habit of paying ready money to the plaintiff for a certain quantity which was allowed for the family, but the maid servant obtained some clandestinely for her own use and that of the defendant's wife's mother, but it did not appear that the plaintiff knew of this circumstance: it was held, that the defendant was not liable, Lord Eldon *saying that, "to allow such a demand would be to put it [*140] in the power of servants and tradesmen to ruin the master."

Again, where(*b*) a butler ordered brandy in his master's name, and the brandy was consumed by the butler and cook, without the master being privy to the order, delivery or consumption, the master was held not liable to pay for it.

And where(*c*) a lady ordered of a tailor two suits of livery a year for her coachman, and the tailor supplied one, but at the desire of the coachman supplied plain clothes instead of the other: it was held, that the lady was only liable to pay for the livery actually supplied, and was entitled to set off against a subsequent account for clothes the price of a suit of livery which had been supplied and paid for, but taken back by the tailor from the coachman.

Upon similar principles,(*d*) where a servant having injured his master's chaise by careless driving, left it with a coachmaker to be repaired without acquainting his master, and without any orders from him, and it appeared that he had never employed the coachmaker, who refused to deliver up the chaise without payment of his bill for the repairs; the master

(*y*) Story on Ag. sect. 73; and see Smethurst v. Taylor, 12 M. & W. 545.
(*z*) Stubbing v. Heintz, Peake, 47; and see per Lord Abinger, C. B., in Flemyng v. Hector, 2 M. & W. 181.
(*a*) Pearce v. Rogers, 3 Esp. 214.
(*b*) Maunder v. Conyers, 2 Stark. 281.
(*c*) Hunter v. Countess Dowager of Berkeley, 7 C. & P. 413.
(*d*) Hiscox v. Greenwood, 4 Esp. 174.

having brought an action for the chaise, recovered: as it was held, that the coachmaker not having inquired of the master whether the order for repairs was given by his authority, had no claim against him for the amount of his bill.

The bailiff of a large farming establishment, through whose hands all payments and receipts take place, has no implied authority to pledge the credit of his employer by drawing and indorsing bills in his name.(*e*) Nor has the resident agent of a mining company an implied authority to borrow money upon the credit of the shareholders.(*f*)

Nor has the secretary of an intended railway company implied authority, *as such*, to bind individual members of the provisional or managing committee upon contracts, even for articles necessary for carrying on the business *of the company. In order to fix them with liability to pay for goods, work, or labour, &c. ordered by the secretary, it [*141] is necessary to connect the party sought to be charged with the order, either by shewing his previous consent or subsequent recognition of it.(*g*) The same principle applies to letters written by such secretary. They are only binding upon the board of directors or such members of it as authorize the secretary to write them.(*h*) Therefore, where(*i*) an engineer brought an action against a provisional committeeman of a railway company for work and labour in surveying the intended line of railway, and the only evidence to charge the defendant was a letter written by the secretary, but there was no evidence to connect the defendant with the letter, the plaintiff was nonsuited.

Nor can a master be rendered liable upon a contract made by his servant, if at the time the contract is entered into the party with whom it is made know not only that the servant is only an agent, but also who his master, or principal, is,(*k*) and notwithstanding that knowledge chose to *make the servant his debtor*, dealing with him and him alone. In that case the party cannot, on the failure of the servant to perform the contract, turn round and charge his master, having once made his election at the time when he had the power of choosing between the one and the other.(*l*)

The fact that articles purchased by a servant have been *used by the master* will not alone make the master liable to pay for them, where the previous conduct of the master was not such as to give the servant *an implied authority to pledge his credit. That fact, how- [*142] ever, would be sufficient prima facie evidence to charge the master, unless

(*e*) Davidson v. Stanley, 2 M. & G. 721. See Waters v. Brogden, 1 Y. & J. 457.

(*f*) Hawtayne v. Bourne, 7 M. & W. 595.

(*g*) See Barnett v. Lambert, 15 M. & W. 489; Reynell v. Lewis, 15 M. & W. 517; Cooke v. Tonkin, 9 Q. B. 936; Barker v. Stead, 3 C. B. 946; Williams v. Pigott, 2 Exc. 201; Bailey v. Macaulay, and other cases, 19 L. J., N. S, Q. B. 73.

(*h*) Burnside v. Dayrell, 3 Exc. 224; and see Todd v. Emly, 7 M. & W. 429.

(*i*) Rennie v. Wynn, 4 Exc. 691.

(*k*) If the party know the servant to be merely an agent, but do not know who his principal is, and debit the servant, he may, in that case, charge the principal when discovered; Thomson v. Davenport, 9 B. & C. 78; and see Thomas v. Edwards, 2 M. & W. 215.

(*l*) See per Lord Tenterden, in Thomson v. Davenport, 9 B. & C. 86, following the cases of Addison v. Gandasequi, 4 Taunt. 574, and Paterson v. Gandasequi, 15 East, 62. See 2 Smith's L. C. 198, et seq.

he could discharge himself by shewing either that the credit was given to the servant, or that the servant was supplied by him with ready money to pay for the articles purchased, and therefore had no authority to pledge his master's credit.(*ll*)

And a master who has been in the habit of paying for goods ordered by his servant, and has thus impliedly given him authority to pledge his credit, may, by *giving notice* to the tradesman who has supplied the goods on those terms, *revoke or terminate the servant's authority* to pledge his master's credit. And lapse of time would, it is conceived, in many cases, raise a presumption that the servant's authority to pledge his master's credit was terminated.(*m*)

Where,(*n*) however, the defendant had been in the habit of dealing with the plaintiff for beer on credit, but once, when he paid the bill, told the man who brought the beer that he would run up no more bills with the plaintiff, but would pay for the beer as it came in, and afterwards gave his servant money to pay for the beer, but the servant embezzled it: the defendant was held liable, as he did not show that the plaintiff himself had notice of this change in the mode of dealing; and Lord Eldon said, that unless he had, it must be taken that the plaintiff understood that the dealings between him and the defendant continued in the usual way.

And it is clear that mere notice to the servant himself who had general authority to make contracts in his master's name, would not exonerate the master from liability upon contracts made by the servant after his discharge.(*o*)

[*143] Thus, in a case(*p*) where a servant had power to *draaw bills of exchange in his master's name, and afterwards was turned out of the service, Holt, C. J., said: "If he draw a bill in so little time after that the world cannot take notice of his being out of service, or if he were a long time out of his service, but that kept so secret that the world cannot take notice of it, the bill in those cases shall bind the master."

The case of Monk v. Clayton,(*q*) where the act of a servant, though out of place bound his master by reason of the former credit given him by his master's service, the other not knowing that he was discharged," is one of a similar kind.

The master's death operates as a revocation of the servant's authority

(*ll*) Paley on Ag. sect. 165; Pearce v. Rogers, 3 Esp. 214. See, however, Rimell v. Sampayo, 1 C. & P. 255, ante, p. 136, where Littledale, J., thought, that if the master use the articles, he ought to ascertain that his credit is not pledged, but the jury thought the tradesman ought to ascertain that the servant had authority to pledge his master's credit; and see Hiscox v. Greenwood, 4 Esp. 174, ante, p. 140.

(*m*) See ——— v. Harrison, 12 Mod. 346.

(*n*) Gratland v. Freeman, 3 Esp. 85. (*o*) Trueman v. Loder, 11 A. & E. 589.

(*p*) ——— v. Harrison, 12 Mod. 346; and see Newsome v. Coles, 2 Campb. 617, where, after a dissolution of partnership, and notice of it published in the London Gazette, and sent round to all the customers of the firm, the retiring partners were held not liable to pay bills drawn or accepted by the remaining partner in the name of the old firm.

(*q*) Cited by the Court in Nickson v. Brohan, 10 Mod. 110.

to pledge his credit: after that event, therefore, the master's representatives would not be bound by the servant's contracts.(*r*)

IN CASES OF TORT—CRIMINALITER.

A master is not, generally speaking, criminally responsible for the acts of his servants, unless he expressly command or personally co-operate in them. In criminal cases they must each answer for their own acts, and stand or fall by their own behaviour.(*s*)(1)

But where one man *expressly* orders another to do an illegal act, it is clear that the employer, at least, is accountable for that act.(*ss*) Whether or not the person *employed is also criminally responsible, must depend upon circumstances. Thus, where the lessee(*t*) of a coal mine had, from the shaft opened to work it, carried on extensive workings of coal, and, by means of these workings, had gotton coal belonging to about forty different proprietors, without their sanction or knowledge, and had thus unlawfully possessed himself of 10,000*l.* worth of the coal of other persons;—(the evidence extended to the getting of coal continuously during a period of upwards of four years, and to operations conducted by different underlookers and by many different workmen);—but it did not appear that the lessee had himself *personally* touched or removed any of the coal. He was nevertheless convicted of stealing it;(*u*) Erle, J. observing, "The prisoner did not, by his own hand, pick or remove the coal; but if a man does, by means of an innocent agent, an act which amounts to a felony, the employer, and not the innocent agent, is the person accountable for that act." [*144]

But in cases of this sort, the master may perhaps, strictly speaking, be more correctly said to be answerable for *his own* acts than for the acts of his servant.

There are, moreover, many cases in which the act of the servant, having been within the usual scope of his employment, has been considered to have been done by the *implied* command of the master, and *he* has been held criminally responsible for it, although he may, in the particular intance, have been perfectly ignorant of the doing it. Thus, in cases of libel previously to the statute of 6 & 7 Vict. c. 96, the publishers and proprietors of newspapers, and other publications were frequently held liable to criminal informations for libels, published by their ser-

(*r*) See Blades v. Free, 9 B. & C. 167.

(*s*) Rex v. Huggins, 2 Str. 882; S. C. 2 Ld. Raym. 1574; Paley on Ag. 303; Story on Ag. sect. 452; Smith's Merc. Law, 139. So a sheriff is not liable criminaliter, though he is civiliter, for the acts of his bailiff; Laycock's case, Latch, 187; Sanderson v. Baker, 3 Wils. 310, 316; Woodgate v. Knatchbull, 2 T. R. 148; Stanway, q. t. v. Perry, 2 B. & P. 157; Peckell v. Layton, 2 T. R. 512, 712; Brown v. Compton, 8 T. R. 424; Sturmy q. t. v. Sheriff of Middlesex, 11 East, 25.

(*ss*) Fost. 349; Rex v. Palmer, 1 New Rep. 97; Rex v. Michael, 9 C. & P. 357.

(*t*) Rex v. Bleasdale, 2 C. & K. 766.

(*u*) Under 7 & 8 Geo. 4, c. 29, s. 37.

(1) See Foster v. The Essex Bank, 17 Mass. R. 508-510; Richmond v. Vanderbelt, 1 Hill's N. Y. Rep. 480.

vants in the usual course of their employment, although such publishers and proprietors personally had nothing to do with the publication of the libels.(*v*) Evidence of publication by a servant, however, *only [*145] affords a prima facie presumption of his master's guilt, which he may now rebut by proving that such publication was made without his authority, consent or knowledge, and did not arise from want of due care and caution on his part.(*w*)

So, also, masters have been frequently held liable to *informations for penalties*, incurred by the breach of some statutory regulations, by persons in their employ, although the masters themselves may have been perfectly ignorant that, in the particular instance, any breach of the law has been committed. These informations, it is true, do, in strictness, partake more of the nature of civil proceedings to recover that which is a debt to the Crown, than of a criminal proceeding;(*x*) but still they are *penal* proceedings, and it is conceived, therefore, that they may be properly mentioned in this place.

Perhaps the most familiar instances of the master's liability to this kind of proceeding, are to be found in cases of informations for breach of the revenue laws, in which cases, if a master were not held responsible for the acts of his servants, the revenue laws might, as was observed by Pollock, C. B., on a recent occasion,(*y*) be *evaded with the [*146] utmost facility and impunity, and they would be reduced to a mere dead letter.

In an old case in Dyer,(*z*) it appeared that the deputy of a customer in a creek of a port,—(in which case a deputy was to be made by the statute of the first year of Q. Eliz. c. 12, [c. 11, s. 8,]—falsely concealed the custom of a merchant, and the customer himself, ignorant of this, certified by his oath the customs of the port into the Exchequer,

(*v*) Rex v. Almon, 5 Burr. 2686; Rex v. Walter, 3 Esp. 21; Rex v. Gutch, M. & M. 433, 438. As to the liability of the editor to indemnify the proprietor when fined for the publication of a libel, see Colburn v. Patmore, 1 Cr. M. & R. 73. It is not *necessary*, *now*, in actions, prosecutions, or other proceedings for libel contained in a newspaper, to prove that it was purchased of the defendant or his servants, see 6 & 7 Wm. 4, c. 76, s. 8, though that course *may* be adopted; Rex v. Baldwin, 8 A. & E. 168.

(*w*) 6 & 7 Vict. c. 96, s. 7.

(*x*) See per Bayley, J., in Att. Gen. v. Siddon, 1 Cr. & J. 226; and see Atcheson v. Everitt, Cowp. 391, that penal actions are civil suits.

(*y*) Att. Gen. v. Allen, Exc. Mich. Term, 1850. This criminal liability of a master for the acts of his servant in violating the Revenue Laws, recently received a forcible illustration in the informations (understood to amount to one hundred and twenty, or upwards) filed against the London Dock Company, and the St. Katharine Dock Company; the alleged severity of which proceeding, produced a large meeting of influential merchants, &c., in the city of London, in December, 1851, at which a series of Articles (as they were termed,) were agreed upon, as the foundation of a proposed alteration in the law of customs. One of those Articles [7] was as follows: "Merchants, shipowners, and others, should not be made responsible for the crimes or offences of their servants or crews, except where guilty knowledge, or the most culpable negligence, is clearly traced home to them." There seems no good reason why the customs laws should not at least contain a proviso exempting the master from criminal responsibility for the acts of his servants where guilty knowledge or gross negligence is not brought home to the master, and the servant *has been convicted*, similar to 7 & 8 Geo. 4, c. 52, s. 46, vide post, p. 150; or a provision similar to that contained in the Libel Act 6 & 7 Vict. c. 96, s. 7, ante, p. 145; 3 & 4 Wm. 4, c. 103, s. 30, post, p. 433, and 5 & 6 Vict. c. 99, s. 13, post, p. 443; 7 & 8 Vict. c. 15, s. 41, post, p. 479; 8 & 9 Vict. c. 29, s. 30, post, p. 515.

(*z*) Anon. Dyer, 238 b.

according to the false information of his deputy; and judgment was given for the Queen against the customer, who was held liable for the forfeiture of the treble value of the merchandize so customed, and to be fined and ransomed according to the stat. 3 Hen. 6, c. 3. And in Lane v. Cotton,(a) Holt, C. J., after citing the above case in Dyer, said, "And what is the reason thereof, but because the principal shall answer for his deputy."

Again, where an Excise officer(b) discovered on the defendant's premises a quantity of tobacco, for which he requested to see the permit; and the defendant's servant said he had one, when in fact there was none; and ultimately produced a permit for the removal of different tobacco, and dated after the discovery by the officer; the defendant was held liable to an information for penalties for harbouring and concealing tobacco without paying duty, although at the time of the discovery, he was from home, and had been absent for some time previously. In giving judgment, Bayley, B. said, "This is a case in which, to my mind, the act of the servant is to be considered as being an act done in the master's business, and within the scope of the authority probably given by the master to the servant.

"This is not the ordinary case of a servant selling, in his master's shop, the articles in which the master deals, in which it is quite clear that he is acting within the ordinary scope of the authority which he has received from his master, and, therefore, that the act of the servant *in making the sale, is the master's act; upon which principle [*147] all the cases of libel have gone.(c)

"Neither is this the case of an act done by a servant in the manufacture of articles which the master is himself to manufacture. There the servant is merely acting in the business of the master, and within the scope of the authority which he actually receives from his master. The authority which he receives from his master is an authority to make and manufacture, and the master is responsible for his conduct, prima facia, as to the means he adopts in making and manufacturing.

"But this is a case certainly of a different description, and I agree with the distinction that was taken when it was argued,—that this does not fall within the ordinary range of the cases of a servant's act being the master's act. But in order to form a judgment whether this is the master's act or not, and within the scope of the authority which ought to be considered as given by the master to the servant, you must look at the nature of the act, and see with what view that act was done, and the participation which the master had in anything to which that act referred.

"This is the case of a servant of a fraudulent master endeavouring, by his own act, to conceal his master's fraud, and to prevent the consequences which would otherwise fall upon the master in respect of that fraud. From the nature of the service in which the party is employed, and from the conduct of the master in his fraud, you may infer whether or no the servant had prima facia an authority from the master; not perhaps specifi-

(a) 12 Mod. 489.
(b) 1 Cr. & J. 120; S. C. 1 Tyr. 41; see Att. Gen. v. Riddle, 2 C. & J. 493.
(c) Rex v. Almon, 5 Burr. 2686; Rex v. Gutch, M. & W. 433.

cally, for the doing of this specific act, but for the purpose of doing that which, in the exercise of his discretion upon a moment of embarrassment —which the possession of an improper article might naturally create, the servant should think and deem to be best."

The learned Baron then went through the facts of the case, which, in his opinion, formed prima facie evidence to shew that the act of the servant was the act of the master, "though," said he, "the master was certainly at liberty to have produced evidence for the purpose of rebutting that prima facie case; but in the absence of any evidence to rebut that case, it was rightly left to *the jury, and *the jury were bound to consider it as being the master's act.*" [*148]

So where(*d*) a statute(*e*) for regulating the making of bread enacted, that if any of the loaves authorized by that act to be made should have in them any alum, &c., "every person offending therein," should be liable to certain penalties: it was held, that a master baker was liable to an indictment for supplying loaves containing lumps of crude alum, though his foreman proved that he was the person who made the bread.

And where a statute(*f*) imposed a penalty on *every person* who should be concerned in the unshipping of any goods, the duties for which had not been paid: it was held,(*g*) that *each partner*(*h*) of a firm, whose clerk had been guilty of a fraud, by altering the Blue Book of the Custom House, (in which the amount of goods was entered for duty,) was liable to the penalty incurred through the act of their clerk, as they *derived a benefit* from his fraud, and produced no evidence to rebut the prima facie evidence of knowledge on their part which arose from that circumstance.

Again, masters are liable to indictment for public nuisances,(*i*)—such as carrying on offensive trades,—committed by their servants, although the masters have nothing to do *personally* with the nuisance complained of. In such cases also, if a master could shield himself from criminal responsibility on the ground that he personally had nothing to do with the carrying on the trade, the real offender might escape with impunity, and the public grievance remain unredressed. It has, indeed, scarcely ever been contended, that the master, in such cases, was not guilty on the ground that the nuisance *was perpetrated through the agency of others:(*k*) and where that objection has been taken, it has been speedily overruled. Thus, in Rex v. Medley,(*l*) the chairman, deputy chairman, and other directors of a gas company, and several per- [*149]

(*d*) Rex v. Dixon, 4 Campb. 12; S. C. 3 M. & S. 11; and see Reg. v. Bradley, 10 Mod. 156.

(*e*) 36 Geo. 3, c. 22.

(*f*) 3 & 4 Wm. 4, c. 53, s. 44.

(*g*) Reg. v. Dean, 12 M. & W. 39.

(*h*) It would have been otherwise had the penalty been attached to each offence, and not to each party concerned; ibid.; and see Rex v. Clark, Cowp. 610.

(*i*) In Tuberville v. Stampe, 1 Ld. Raym. 264, Holt, C. J., said, "If my servant throws dirt into the highway I am indictable." See 1 Bl. Comm. 431, 432; Noys Maxims, c. 44; Bush v. Steinman, 1 B. & P. 407; Reedie v. London and North Western Railway Company, 4 Exc. 244.

(*k*) See Rex v. Pedley, 1 A. & E. 822, where a landlord was held liable to be indicted for a nuisance committed by his tenants such nuisance being the inevitable result of the occupation, and the landlord receiving rent for that occupation. See, however, Rich v. Basterfield, 4 C. B. 783.

(*l*) Rex v. Medley, 6 C. & P. 292.

sons employed by them in carrying on the works, were jointly indicted for a nuisance occasioned by conveying the refuse of the gas, &c., into the river Thames, whereby fish were destroyed, and the water rendered unfit to drink. On the part of the defendants it was contended, that the directors of the company were not liable, as no criminal participation on their part, in the acts done by their workmen, was shewn, and they did not even know what was done. But they were found guilty and fined. Lord Denman, C. J., saying, "it made no difference that the directors were ignorant of what had been done, provided they gave authority to the manager to conduct the works. It seems to me both common sense and law, that if persons, for their own advantage, employ servants to conduct works, they must be answerable for what is done by those servants."

And again where a railway company(*m*) was indicted for cutting through and obstructing a highway by works performed in a course not conformable to the powers conferred by the act of Parliament, and one of the grounds on which it was argued that a company was not liable to an indictment for a misfeasance committed by their servants was, that the individuals doing the act might be indicted and punished, Lord Denman said: "We are told that this remedy is not required, because the individuals who concur in voting the order, or in executing the work, may be made answerable for it by criminal proceedings. Of this there is no doubt. But the public knows nothing of the former, and the latter, if they can be identified, are commonly persons of the lowest rank, wholly incompetent to make any reparation for the injury. There can be no effectual means for deterring *from an oppressive exercise of power for the purpose of gain, except the remedy by indictment against [*150] those who truly commit it, that is, the corporation acting by its majority; and there is no principle which places them beyond the reach of the law for such proceedings."

Upon similar principles it is conceived that an inn-keeper might be rendered liable to an indictment for a refusal by his servant to receive a guest into the inn, if it were within the scope of the servant's employment to receive guests.(*n*)

The master's liability to answer in a criminal suit for the act of his servant does not, however, by any means involve the exemption of the servant himself to answer criminally for his own acts. The question, however, as to how far the commands of the master will justify the act of the servant, will be more properly brought under consideration in a separate Chapter.

Since, however, this liability of masters to answer criminally for the illegal acts of their servants might occasionally operate hardly upon masters, by putting it in the power of wicked servants to subject their masters, to penalties by their own *wilful* violation of the law, it is sometimes enacted, for the protection of masters, that servants *wilfully* transgress-

(*m*) Reg. v. Great North of England Railway Company, 9 Q. B. 315. In Rex v. Pease, 4 B. & Ad. 30, some of the members of a railway company were indicted, together with their servants, for a nuisance occasioned by the railway.

(*n*) See Rex v. Ivens, 7 C. & P. 213, where the master refused to receive the guest. And as to that case, see Fell v. Knight, 8 M. & W. 269.

ing the law shall themselves be subject to a penalty, and their master, upon conviction of his servant, shall be exempt from further criminal liability.(*o*)

But where an act of Parliament,(*p*) which imposed various penalties on maltsters who should violate the provisions of the act, contained also a clause(*q*) for punishing by summary proceedings before a magistrate any workman, servant, or labourer, employed by or in the service of any maltster, who should maliciously, and with intent to injure such maltster, violate the provisions of the act: with a proviso that the maltster himself should still continue liable to the penalties imposed for violation of the act, unless he should forthwith prosecute such workman to conviction, and produce to the Commissioners of Excise a certificate of such conviction: [*151] and a maltster **fraudulently* procured the conviction of his servant for an offence under the act, with a view to protect himself from proceedings for the same offence, the Court of Queen's Bench granted a certiorari to remove, and quashed the conviction.(*qq*)

And as the liability of a master to answer criminally for the acts of his servants presupposes, and is, in fact, founded upon, the violation of some *public* duty legally binding upon the master, it can, of course, only exist where such duty exists, and must cease when such duty ceases to be binding. And, therefore, where a vessel was sunk by accident in a navigable river, and without any default on the part of the owner or his servants, as the law does not ordinarily cast upon the owner of a vessel sunk under such circumstances the duty of using any precaution, by placing a buoy or otherwise, to prevent other vessels from striking against it: it was held, that the owner was not liable to an indictment, or to an action at the suit of a party sustaining injury in consequence of a collision with the sunken vessel, for omitting to remove it or take precaution to prevent accidents.(*r*)

IN CASES OF TORT—CIVILITER.

A master is ordinarily liable to answer in a civil suit for the tortious or wrongful acts of his servant, if those acts are done in the course of his employment in his master's service:(*s*) the maxims applicable to such cases being, Respondeat superior, and that before alluded to, Qui facit per alium facit per se. This rule, with some few exceptions, which will be hereafter pointed out, is of universal application, whether the act of the

(*o*) See, for instance, 7 & 8 Geo. 4, c. 52, s. 46; and see the provision in the Libel Act, 6 & 7 Vict. c. 96, s. 7, ante, p. 145; 3 & 4 Wm. 4, c. 103, s. 30, post, p. 433, and 5 & 6 Vict. c. 99, s. 13 post, p. 433; 7 & 8 Vict. c. 15, s. 41, post, p, 479; 8 & 9 Vict. c. 29, s. 30, post, p. 515.

(*p*) 7 & 8 Geo. 4, c. 52. (*q*) Sect. 46.

(*qq*) Rex v. Gillyard, 12 Q.B. 527.

(*r*) Rex v. Watts, 2 Esp. 675. See Parnaby v. Lancaster Canal Company, 11 A. & E. 223; Brown v. Mallett, 5 C. B. 599; and see Reg. v. Barrett, 2 Carr. & K. 343, where it was held, that an engineer could not be convicted of manslaughter on an indictment which did not allege a duty in him which he had neglected to perform.

(*s*) By the civil law the liability was confined to the person standing in the relation of pater familias to the wrong doer, Dig. lib. 9, tit. 3. But by the English law the liability is more extensive.

servant be one of omission or commission, whether negligent, *fraudulent, or deceitful, or even if it be an act of positive malfeasance or misconduct; *if it be done in the course of his employment* his master is responsible for it, civiliter, to third persons.(*t*) And it makes no difference that the master did not authorize, or even know, of the servant's act or neglect; for even if he disapproved of or forbad it, he is equally liable if the act be done in the course of the servant's employment. [*152]

And it is but reasonable that it should be so; for surely it is more just, that he who selects a person as his servant, from a knowledge of or belief in his skill and care, and who can remove him for misconduct,(*u*) and whose orders that servant is bound to receive and obey, should suffer for the misconduct of that servant, than that an innocent third party, who had not the opportunity of selection, or the power of removal, and enforcing obedience to his orders, should be prejudiced by such misconduct.

Accordingly, numerous instances occur in which the principle of holding the master responsible, civiliter, for the tortious acts of his servants, has been acted upon and enforced.(*v*)

Thus, where(*w*) the servants of A. brought a coach with two ungovernable horses into Lincoln's Inn Fields to train them, and they, being not to be managed, ran upon the plaintiff, the master was held liable for the damage occasioned.

So where(*x*) a pawnbroker's servant took a pawn, and when the pawner came and tendered the money to the servant he said he had lost the goods, the master was held liable in trover. So where(*x*) the servants of A. with his cart ran against another cart, wherein was a pipe of *sack, and overturned the cart and spoiled the sack: it was held, that an action lay against A. And so where(*x*) a carter's servant ran his cart over a boy: it was held, the boy should have his action against the master for the damage he sustained by this negligence. In fact, actions against masters for damages sustained by the negligent driving of their servants are so common, that it is unnecessary to multiply instances of the master's liability in such cases. [*153]

Again, where(*y*) the defendant's servants so negligently kept a *fire*

(*t*) Story on Ag. sect. 452; Paley on Ag. 294, 298, and cases there cited; and also the cases cited, post.

(*u*) The mere power of removal, apart from the power of original selection, will not render the person who has it liable for the acts of persons whom he has power to remove if they are not *his* servants; Reedie v. London and North Western Railway Company, 4 Exc. 244; and see Chilcot v. Bromley, 12 Ves. 114.

(*v*) Whether the act complained of amount to a misfeasance, negligence, or omission of duty, is obviously a question of fact, and must in each case depend upon the particular circumstances of the case. See Crofts v. Waterhouse, 3 Bing. 319.

(*w*) Michael v. Alestree, 2 Lev. 172. (*x*) Jones v. Hart, 2 Salk. 441.

(*y*) Turberville v. Stampe, 1 Ld. Raym. 264; S. C. 1 Salk. 13; 1 Comyn's Rep. 32; and see Beaulieu v. Finglam, 2 H. 4, fo. 18, pl. 6, cited 1 C. B. 586, note. A person on whose property a fire accidentally begins is not now liable to an action at the suit of any person who may be injured thereby. See 6 Ann. c. 31, s. 6; 12 Geo. 3, c. 73; 14 Geo. 3, c. 78, s. 86; 7 & 8 Vict. c. 84, s. 1, and schedule (A.), which acts are *general* law; Richards v. Easto, 15 M. & W. 251; S. C. 3 D. & L. 522. But where a fire is caused, or having been knowingly lighted is permitted to extend, *by negligence*, the master is still liable; Filliter v. Phippard, 11 Q. B. 347; and see instances of actions

lighted in his field that it extended to and consumed the heath of the plaintiff, the defendant was held liable to an action for the injury; and Lord Holt observed: "If the defendant's servant kindled the fire in the way of husbandry and proper for his employment, though he had no express command of his master, yet his master shall be liable to an action for damage done to another by the fire; for it shall be intended that the servant had authority for his master, it being for his master's benefit."

[*154] Actions against carriers, whether by land(z) or *water,(a) for loss or injury to passengers or goods entrusted to their care, also frequently involve a similar principle, since carriers are generally answerable for the honesty of their servants.(b) And those against railway(c) and steam packet companies(d) necessarily do so, as such companies can only act through the instrumentality of servants.(e)

Where the owner of a boat,(f) which was accustomed to ply for hire and carry passengers across a haven, employed a servant for that pur-

[*155] pose, and the servant, on one occasion, received a passenger on board, *and carried him across the haven near the line of an ancient *ferry*, and paid the fare over to his master: it was held, that the servant was acting at the time in the course of his master's service and

against railway companies for negligent management of their engines by their servants, whereby sparks flew out and caused fire; Aldridge v. The Great Western Railway Company, 3 M. & G. 515; Piggott v. Eastern Counties Railway Company, 3 C. B. 229.

(z) By stat. 11 Geo. 4 & 1 Wm. 4, c. 68, the liability of carriers *by land* is limited in certain cases. But by sect. 8, it is provided, that nothing in that act shall be deemed to protect any mail contractor, stage coach proprietor, or other common carrier for hire, from liability to answer for loss or injury to any goods or articles whatsoever arising from the *felonious* acts of any coachman, guard, bookkeeper, porter, or other servant in his or their employ, nor to protect any such coachman, guard, bookkeeper, or other servant, from liability for any loss or injury occasioned by his or their own personal neglect or misconduct." See Machu v. South Western Railway Company, 2 Exc. 415.

(a) By 53 Geo. 3, c. 159, the responsibility of shipowners is limited in certain cases to the value of the ship and freight. See Brown v. Wilkinson, 15 M. & W. 391.

(b) In White v. Boulton, Peake, 81, the proprietors of a mail coach were held answerable for an injury happening to a passenger through the misconduct of the driver; though they are not liable if such injury happen by accident; Crofts v. Waterhouse, 3 Bing. 321; Bradley v. Waterhouse, M. & M. 154. See generally on this subject, Selw. N. P., tit. "Carriers; and see Ross v. Hill, 2 C. B. 877; S. C. 3 D. & L. 877, where a cab proprieter was held liable for the loss of a passenger's luggage through the negligence of the cabdriver. See also Williams v. Cranston, 2 Stark. 82, where a plaintiff suing the servant was nonsuited, on the ground that he ought to have sued the master; Cavenagh v. Such, 1 Price, 328 acc.

(c) Such as Muschamp v. The Lancaster and Preston Junction Railway Company, 8 M. & W. 421; Crouch v. London and North Western Railway Company, 2 Carr. & K. 789; Smith v. London, Brighton and South Coast Railway Company, 7 C. B. 782; Richards v. The same Company, 7 C. B. 839; Chilton v. The London and Croydon Railway Company, 16 M. & W. 212; Eastern Counties Railway Company v. Broom, 6 Exc. 314.

(d) Fenton v. City of Dublin Steam Packet Company, 8 A. & E. 835; Bennett v. Peninsular and Oriental Steam Navigation Company, 6 C. B. 775.

(e) And see Maund v. The Monmouthshire Canal Company, 4 M. & G. 452, where the defendants were held liable in trespass for the act of their servant. In Chilton v. The London and Croydon Railway Company, 16 M. & W. 212, and Eastern Counties Railway Company v. Brown, 6 Exc. 314, it was held, that railway companies might be liable to an action of trespass for an assault committed by their servant.

(f) Huzzey v. Field, 2 C. M. & R. 432.

for his master's benefit, and the master was answerable for his act, and would have been liable in an action on the case for such act, if it had been distinctly proved to have amounted to an invasion of the ferry.

And a master is liable for the *fraud* of his servant, committed in the course of his master's business. Thus, if a goldsmith make plate, wherein he mingles dross, so that it is not according to to the standard, and send his servant to a fair to sell it, who sells it for good plate according to the standard, an action upon the case lies against the master.(*g*)

The rule—that a master is responsible for the acts of his servants—applies, not only to domestic servants who may have the care of carriages, horses, and other things in the employ of the family, but extends to other servants whom the master or owner selects and appoints to do any work or superintend any business, although such servants be not in the *immediate* employ or under the superintendence of the master. As, for instance, if a man is the owner of a ship, he himself appoints the master, and he desires the master to appoint and select the crew; the crew thus become appointed by the owner, and are his servants for the management and government of the ship, and if any damage happens through their default, it is the same as if it happened through the immediate default of the owner himself. The same principle prevails if the owner of a farm has it in his own hands, and does not personally interfere in the management, but appoints a bailiff or hind, who hires other persons under him, all of them being paid out of the funds of the owner, and selected by himself, or by a person specially deputed by him; if any damage happen through their default, the owner is answerable, because their neglect or default is his, as they are appointed by *and through him.(*h*) So, in the case of a mine, the owner employs a steward or manager [*156] to superintend the working of the mine, and to hire under-workmen, and he pays them on behalf of the owner. These under-workmen then become the immediate servants of the owner, and the owner is answerable for their default in doing any acts on account of their employer.(*i*)

Upon this principle it was that the defendant was held liable in Wayland v. Elkins,(*k*) for damage done to the plaintiff's house by a wagon being driven against it. The defendant and one D. were carriers from London to Gosport, and, by an arrangement between them, D. horsed the wagon from London to Farnham, and the defendant then conducted it from Farnham to Gosport. At the time the mischief happened, the wagon was drawn by D.'s horses, and was driven by a servant of D., who had

(*g*) Southern v. How, Cro. Jac. 471; and see Hern v. Nicholls, 1 Salk. 289; Cornfoot v. Fowke, 6 M. & W. 358; Fuller v. Wilson, 3 Q. B. 58; Jones v. Downman, 4 Q. B. 235, note; Downman v. Williams, 7 Q. B. 103; Story on Ag. sect. 264. As to the master's liability to an action *on the warranty*, see ante, p. 128.

(*h*) See Rex v. Hoseason, 14 East, 605.

(*i*) Per Littledale, J., in Laugher v. Pointer, 5 B. & C. 554; and see Stone v. Cartwright, 6 T. R. 411, where it was held, that the agent of a colliery, belonging to an infant, who was appointed manager by the Court of Chancery, was *not* liable for damage caused by colliers hired by a bailiff employed under him to superintend the works. The action should have been brought against the infant. And see Rex v Bleasdale, 2 Carr. & K. 765, ante, p. 144.

(*k*) 1 Stark. 272; S. C. Holt, 227. See the reporter's note at the end of the latter report.

been hired by, and received his wages from D., and with whose employment the defendant had no concern whatever, but this wagon was the property of the defendant. And Gibbs, C. J., held, that the action might be maintained, "upon this principle: the wagon belongs to Elkins, and he receives the profits derived from the use of it: on what terms he engages with D. we do not know; but being jointly entitled with D., and since it is no objection that D. has not been joined, the case is the same as if Elkins had received all the profits. Then, since the wagon was to be drawn for the benefit of Elkins, the servant, to all legal purposes, was the servant of Elkins; although for inferior purposes, and as between the parties, he may be considered as the servant of D."

To the same principle may also be referred the case of Randleson v. Murray,(*l*) though that case is sometimes *placed with a different class of cases—those, namely, in which an owner of fixed property has been held responsible for the acts of persons not strictly speaking his servants.(*m*) In that case the defendant, who was a warehouseman at Liverpool, had employed a master porter to remove some barrels of flour from his warehouse: the master porter used his own tackle, and brought and paid his own men, but employed a master carter to carry the barrels away, and the master carter brought his own carts and men, one of whom was the plaintiff. The master porter's tackle failed whilst being used by the men, a barrel fell, and injured the plaintiff: and the defendant was held liable for the damage, on the ground that the men were, in point of law, his servants.

[*157]

And so where a cornfactor was absent from his shop, and during his absence his sister managed his business; she wanted to send out some corn to a customer, and for this purpose employed a person who occasionally worked for her brother, and who, at the time of such employment, was in a state of inebriety; this man, contrary to the practice of the cornfactor's shop, took out the corn on a small warehouse truck, which he negligently left on the road, whereby a person driving along in his chaise was injured; the cornfactor was held liable in an action at the suit of this person.(*n*)

And if a servant is *acting in the execution* of his *master's orders*, and by his negligence causes injury to a third party, the master will be responsible although the *servant's act* was *not necessary* for the proper performance of his duty to his master, or was even contrary to his master's orders. Upon this subject nice questions often arise as to how far the servant *was* acting in his master's service at the time the injury was done: though the law is clear it is sometimes difficult of application to particular cases. It is well illustrated by the following cases, in which the master was held liable.

(*l*) 11 A. & E. 109. It may well be doubted how far this *case* would be supported now.

(*m*) As to those cases, see Reedie v. London and North Western Railway Company, 4 Exc. 244,(1) post, p. 167.

(*n*) Wanstall v. Pooley, Q. B., M. T. 1841; 6 Cl. & F. 910, note.

(1) See note to American edition of these Reports.

In an action(*o*) for the negligent driving of the defendant's coachman, whereby the plaintiff's carriage was *upset, it appeared that the accident arose from the defendant's coachman striking the plaintiff's horses with his whip, in consequence of which they moved forward, and the carriage was overturned. At the time when the horses were struck, the two carriages were entangled. The defendant was held liable for the damage caused by his servant's act, although wanton, as it was done in pursuance of his employment. And per Curiam, "The distinction is this; if a servant driving a carriage, in order to effect some purpose of his own, *wantonly* strike the horses of another person, and produce the accident, the master will *not* be liable. But if, in order to perform his master's orders, he strikes, but *injudiciously*, and in order to extricate himself from a difficulty, that will be negligent and careless conduct for which the master *will be* liable, being an act done in pursuance of the servant's employment." [*158]

So if a coachman were driving his master, and were ordered not to drive so fast, but he nevertheless continued to do so, and an accident occurred in consequence, the master would be responsible for the injury; for in that case the coachman would still be driving *for his master*, though driving badly.(*p*)

So a master was held(*q*) liable for damages caused by the negligent driving of his cart in the city, by his servant, although it was proved that the cart ought not, in carrying out his orders, to have been in the city at all: and Parke, B. said, "If the servants being on their master's business, took a *detour* to call upon a friend, the master will be responsible. If you think the servants lent the cart to a person, who was driving without the defendant's knowledge, he will not be responsible. Or if you think the young man who was driving took the cart surreptitiously, and was not at the time, employed on his master's business, the defendant will not be liable. The master is only liable where the servant is acting in the course of his employment. If he was going *out of his way against his master's implied commands, when driving on his master's business, he will make his master liable; but if he was going on a frolic of his own, without being at all on his master's business, the master will not be liable." [*159]

Again, a master was held(*r*) liable for damages caused by the negligent driving of his servant, who, after having set his master down, drove round to deliver a parcel of his own, and did not drive *directly* where he was ordered to go: Erskine, J., saying, "Evidence has been given that the master directed the servant to drive to the Red Lion, in Castle Street, but that the servant improperly drove to the Old Street Road to deliver a parcel of his own; and the point has been put to the Court, that inas-

(*o*) Croft v. Alison, 4 B. & Ald. 590.

(*p*) 7 M. & G. 566. See Sleath v. Wilson, 9 C. & P. 612.

(*q*) Joel v. Morison, 6 C. & P. 501; and see Booth v. Mister, 7 C. & P. 66, where a master was held liable for damage caused by his cart, which was entrusted to his servant, but which another person, a *friend of the servant*, *was driving* when the accident happened, Lord Abinger saying, he thought that as the defendant's servant was in the cart, the reins being held by another man made no difference.

(*r*) Sleath v. Wilson, 9 C. & P. 607; S. C. nom. Heath v. Wilson, 2 M. & Rob. 181.

much as it is clear that the servant was not at that time engaged in his master's business this action cannot be maintained. But I am of opinion that this action may be maintained. I think the law has been most properly laid down by Mr. Baron Parke, in the case which has been cited.(*s*) It is quite clear that if a servant, without his master's knowledge, takes his master's carriage out of the coach-house, and with it commits an injury, the master is not answerable, and on this ground, that the master has not entrusted his servant with the carriage. But *whenever the master has entrusted the servant with the control of the carriage it is no answer that the servant acted improperly in the management of it.*"

And a master has been held liable for damage done to a third person, which would not have happened but for the negligence of the defendant's servant, although the *immediate cause* of the damage was *a stranger.*

Thus, a master scavenger was held liable for injury caused by the negligence of his servant in leaving his cart and horse unattended in the street, although the immediate cause of the injury was a passer by, who struck the horse, which backed the cart into the plaintiff's shop windows.(*t*)

Moreover, a master is, generally speaking, liable for *all the consequences* arising from the misconduct of his servant, where an injury arises to a third person from such misconduct: though Pollock, C. B., entertains [*160] considerable *doubt whether a man is responsible for all the *possible* consequences that may, under any circumstances, arise in respect of mischief which by no possibility could he have foreseen, and which no reasonable person, under any circumstances, could be called upon to have anticipated.(*u*)

A master, however, is *not responsible* for the wrongful act of his servant, unless that act be done in the execution of the authority given by his master.(*v*) *Beyond the scope of his employment,* he is as much a stranger to his master as any third person, and therefore his act cannot be regarded as the act of his master.(1)

Thus, in Lyons v. Martin,(*w*) a master was held not liable for an unlawful act committed by his servant, who was authorized to distrain cattle damage feasant on his land, in *driving the plaintiff's horses,* which were on the highway, *on to* his master's land, and then distraining them, as the doing so was not within the scope of his authority. And Patterson, J., said, "A master is liable where his servant causes injury by doing a lawful act negligently, but not where he *wilfully* does an illegal one."

So if a man sends his servant on an errand without providing him with a horse, and he meets a friend who has one, who permits him to

(*s*) Joel v. Morison, ubi supra.

(*t*) Illidge v. Goodwin, 5 C. & P. 190.

(*u*) Greenland v. Chaplin, 19 L. J., N. S., Exc. 293. See Rigby v. Hewitt, ibid. 291.

(*v*) Middleton v. Fowler, 1 Salk. 282; Croft v. Alison, 4 B. & Ald. 590; Lamb v. Palk, 9 C. & P. 629; McManus v. Crickett, 1 East, 106. See Garth v. Howard, 8 Bing. 451, ante, p. 130.

(*w*) Lyons v. Martin, 8 A. & E. 512.

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(1) See Russell v. Early, 13 Ala. Rep. 131.

ride, and an injury happens in consequence, the master is not responsible for that act. If it were so, every master might be ruined by acts done by his servant without his knowledge or authority.(*x*)

And where(*y*) the plaintiff's van, which had brought mineral water to the back entrance of the plaintiff's premises, was unloading, and the plaintiff's gig standing behind it, when the defendant's coachman, with a carriage and pair of horses, came up from the mews into the street, and the carriage being unable to pass the van for want of room, was obstructed for five minutes, when the defendant's coachman got off his box, and took hold of the head of the horse which was in the van in order to *remove the van: this caused the van to move, and a case of mineral water that a person was taking from the van fell down [*161] on the shafts of the plaintiff's gig and broke them: it was held, that the defendant was not responsible for the damage done, as the coachman was not acting in the employ of his mistress at the time the matter occurred.

Nor is a master responsible for injury caused by his servant's negligence *to a person who might*, by the exercise of *ordinary care, have avoided* the consequences of the servant's negligence. It is not, however, sufficient, in order to exempt a master from responsibility, to shew that the party injured did, by his own act, *contribute* to the injury; but it must be shewn that he did not use ordinary care to avoid the consequences of the servant's negligence.(*z*) Whether or not the party injured *did* use ordinary care would be a question proper for a jury to decide, taking into consideration all the circumstances of the case. But if he did not, he would have no right to recover compensation from the defendant for what, properly speaking, was the effect of *his own* want of caution.(1)

Therefore, in an action(*a*) by a passenger in the train of one railway company against another company, with a train belonging to which a collision had taken place, whereby the plaintiff was injured; a plea by the defendants, that the injury was caused *in part* by the negligence of the persons who had the care of the train in which the plaintiff was riding: was held bad, as it was consistent with all the facts stated in it that the plaintiff, or those who had the charge of the train in which he was riding, could not, by the exercise of ordinary care, have avoided the consequences of the defendant's negligence. And Parke, B., said, "The rule of law is laid down with perfect correctness in the case of Butterfield v. Forrester,(*b*) and that rule is, that although there may have been negligence on the part of the plaintiff, yet, unless he might, by the exercise of ordinary care, have avoided the consequences of the defendant's negligence, he is entitled to recover: if by ordinary care he might have avoided them, he is the author of his own wrong."

*The same principle was again acted upon in the case of Davies v. Mann,(*c*) where a master was held liable for the negligence of [*162]

(*x*) Goodman v. Kennell, 3 C. & P. 167.
(*y*) Lamb v. Lady Elizabeth Palk, 9 C. & P. 629.
(*z*) Butterfield v. Forrester, 11 East, 60; and see Clayards v. Dethick, 12 Q. B. 439.
(*a*) Bridge v. The Grand Junction Railway Company, 3 M. & W. 244.
(*b*) Ubi supra. (*c*) 10 M. & W. 546.

(1) See Beers v. Housatonic R. R. Co., 19 Conn. R. 556.

his wagoner, who had driven over and killed the plaintiff's ass, which was wrongfully left fettered in the public road; for although the plaintiff was negligent in leaving his donkey there, yet the donkey's being there was not the *immediate* cause of the injury.

And this principle of holding a master not responsible for damage done by his servant to a person, who might, by the exercise of ordinary care, have avoided the damage, has recently been extended so far as to hold, that a passenger in a public conveyance cannot recover damages for an injury sustained in consequence of the negligence of the driver of another conveyance, against the owner of *that* conveyance, if the persons having the conduct of the conveyance *in which he is a passenger*, could, by the exercise of ordinary and reasonable care, have avoided those consequences; but that his remedy in such case is against the person conveying him, or that person's servants: thus identifying, to a certain extent, the passenger and the driver of a public conveyance. It may indeed be doubted,(*d*) how far the case in which this decision was arrived at will be supported; but even if it is supported, the consequences will not be very important in a practical point of view, as it only goes to the question who is the proper party to be responsible in each case; that the party injured has his remedy against some one still remains perfectly clear.

The case above alluded to is Thorogood v. Bryan,(*e*) which was an action against an omnibus proprietor to recover damages for the negligence of her servant, who had caused the death of the plaintiff's husband,(*f*) by knocking him down and driving over him as he had just [*163] *alighted from another omnibus. The deceased was a passenger in an omnibus belonging to B., and the defendant was owner of another rival omnibus running on the same line of road. Both vehicles had started together, and frequently passed each other as either stopped to take up or set down a passenger. Deceased, wishing to alight, did not await for the omnibus to draw up at the kerb, but got out whilst it was in motion and far enough from the path to allow another carriage to pass on the near side. The defendant's omnibus coming up at the moment, deceased was unable to get out of the way, was knocked down and run over, and shortly after died of the injuries so sustained. But it was held by the Court of Common Pleas, that the defendant was not liable to make compensation for the consequences of her servant's negligence, as there appeared to have been negligence on the part of the driver of the omnibus in which the deceased was a passenger,—and, *for the purposes of that action*, the passenger must be considered as identified with the person having the management of the omnibus he was conveyed

(*d*) See 1 Smith's L. C. 132 *a;* Rigby v. Hewitt, 5 Exc. 240; S. C. 19 L. J., N. S., Exc. 291; Greenland v. Chaplin, 5 Exc. 243; S. C. 19 L. J., N. S., Exc. 293. It is observable, that in the case alluded to in the text (Thorogood v. Bryan) none of the cases were cited in which a master has been held *not responsible* for the act of one whom he *did not select* to discharge the duty he was discharging at the time an accident happened, such as Quarman v. Burnett; Rapson v. Cubitt, &c. See these cases, post, p. 165, et seq.

(*e*) 8 C. B. 115.

(*f*) The action was brought under the statute 9 & 10 Vict. c. 93.

by. Upon this case, however, it may be observed, that the passenger, at the time the accident happened, *had left* his omnibus, and, moreover, that he had left it under circumstances which shewed a want of ordinary care on his *own* part.(*g*) This would seem to be sufficient ground for supporting the *decision* in that case, even should the judgment, identifying the driver with the passenger, be considered erroneous.

But where the party injured was a child, incapable of taking care of itself, a master has been held liable for injury caused to the child by the negligence of his servant, although the child itself, by its own act, brought about the accident. Thus where(*h*) a carman, who had charge of a cart, went into a house, and left the horse and cart standing at the door, without any one to take care of them, for about half an hour, and during his absence a child, under seven years of age, got upon it, and another boy led the horse on, whereby the child was thrown down, run over, and his leg broken: it was held that the carman's master was liable for the damages sustained by the child, although the child was a trespasser, *and contributed to the mischief by his own act; the jury having found that he merely indulged the natural instinct of a [*164] child in amusing himself with the empty cart and deserted horse.

The difficulty, however, which arises in cases of this sort is, not so much in ascertaining the law, as in applying it to the circumstances of each particular case, and ascertaining *who* is to be regarded as *the master* in each case, for it is obvious that the liability arising from the relationship of master and servant cannot exist, unless the relationship itself exist.(*i*) In all cases, therefore, of injury by the act of a servant, it is most important to ascertain, in the first place, *whose servant* the person was who *caused the injury.* And this is an inquiry of greater difficulty than would at first be imagined, and frequently involves questions of considerable nicety. For instance in the ordinary case of a person hiring a carriage, horses, and driver on a job, although it is now settled that if, in such a case, any accident or injury happen to a third person through the carelessness or misconduct of the driver, the hirer is not, in general,(*k*) liable to make compensation for such injury, yet there was formerly considerable doubt upon the subject, and some of the Judges expressed opinions, that the hirer *was* responsible, as being the dominus pro tempore:(*l*) and he certainly is, in some respects, the master, for he may order the carriage to be driven where he pleases.

The question was argued at great length in Laugher v. Pointer,(*m*)

(*g*) See the case put by Coleridge, J., in Woolf v. Beard, 8 C. & P. 374, 375.

(*h*) Lynch v. Nurdin, 1 Q. B. 29.

(*i*) In Stables v. Eley, 1 C. & P. 614, a person who had formerly been in partnership with another man, was held liable to an action on the case for injury caused by the negligent driving of the carter of that other, after the dissolution of the partnership, as his *name was on the cart* that did the damage.

(*k*) The hirer *may* make himself liable by ordering, sanctioning, or adopting the act of the driver; McLaughin v. Prior, 4 M. & G. 48; Burgess v. Gray, 1 C. B. 578.

(*l*) See per Heath, J., in Bush v. Steinman, 1 B. & P. 409.

(*m*) 5 B. & C. 545; and see Chilcot v. Bromley, 12 Ves. 114, where Sir W. Grant held, that a job coachman, supplied with carriage and horses, was not a servant of the person to whom they were supplied, although he paid the coachman board wages, as the contract was with the jobmaster, and the coachman was a *subject* of the contract not a *party* to it.

[*165] where the owner of a carriage hired for *the day of a livery stable keeper, a pair of horses and a driver, through whose negligence an injury was done to the plaintiff's horse; and the question was, whether the owner of the carriage, or the livery stable keeper, who supplied the horses and driver, was liable to make compensation for the injury. The Judges before whom the case was argued, differing in opinion, they all gave separate and elaborate judgments, which, as observed by Mr. Justice Story in his valuable work on Agency,(*n*) "have exhausted the whole prior learning on this subject, and on that account should be attentively studied:" the Lord Chief Justice (afterwards Lord Tenterden), and Littledale, J., holding that the owner of the carriage was not liable; and Bayley, J., and Holroyd, J., holding that he was. The point was thus left unsettled, for not only the Court of Queen's Bench, but the twelve Judges, differed upon it.(*o*) It again arose, and was definitively settled, in Quarman v. Burnett,(*p*)(1) in which the

(*n*) Sect. 453 b.

(*o*) See per Parke, B., in Quarman v. Burnett, 6 M. & W. 507. In Brady v. Giles, 1 M. & Rob. 494, where a similar question arose in an action on the case, Lord Abinger, C. B., left it to *the jury* to say whether the postilions were acting as the servants of the owners of the chaise, or of the hirer,—and said, it always appeared to him that the Queen's Bench pursued an erroneous course in Laugher v. Pointer, when they allowed the question to be discussed as a question of law; and see McLaughlin v. Prior, 4 M. & G. 48.

(*p*) 6 M. & W. 499; and see Fenton v. The City of Dublin Steam Packet Company, 8 A. & E. 385, where the owner of a ship, who let it by charter-party, whereby he agreed to find seamen, was held liable for the negligence. See also Rex v. Haydon, 7 C. & P. 445, where it was held, that the driver of a glass-coach having stolen a purse from the hirer, could not not be convicted of larceny *as a servant*, so as to be liable to the punishment for the aggravated offence, under 7 & 8 Geo. 4, c. 29, s. 46, but he was guilty of simple larceny only.

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(1) The difficulty in deciding this class of cases consists in determining who is to be regarded as *master* of the wrongdoer; whether he is the master who directs the work to be done, or he who having engaged to do the work, sends his own servant to fulfil the engagement. In the language of Parke, B., (Quarman v. Burnett,) "that person is undoubtedly liable, who stands in the relation of master to the wrongdoer." The later cases have adhered to the opinion of Mr. Justice Littledale in Laugher v. Pointer, and hold that he is the responsible party who directs his servant to fulfil his engagement, and not he who only engages *a person exercising a distinct calling*, by the miseonduct of whose servant the injury is caused; Milligan v. Wedge, 12 Ad. & El. 737; Rapson v. Cubett, 9 M. & W. 710; Allen v. Hayward, 7 Ad. & El. N. S. 960; Rieh v. Basterfield 4 Man. G. & Scott, 801; Reedie v. N. W. Railway Co. (Exchequer 13 Jurist Rep. 659, 1849, S. C. Law Reporter, Apr., 1852, p. 626.

An exception to the general rule was suggested in some of the earlier English cases, in respect to injuries caused by the negligent management of real property; and it was declared, that the owner must take care that his property was so used that others are not injured, whether his property was managed by his own servants, or by contractors, or their servants; (per Littledale, Justice, in Laugher v. Pointer, citing Bush v. Steinman, Sly v. Edgely, 6 Esp. R. 6; Leslie v. Pounds, 4 Taunt. R. 649.)

But this distinction after having been questioned in Milligan v. Wedge, and Allen v. Hayward, has been expressly overruled in the case of Reedie v. N. W. Railway Co. It was there held that the case of Bush v. Steinman, was only sustainable, if at all, on the ground of *nuisance.*

On the point whether the owner of real property is responsible for injuries occasioned by others not standing in the relation of servants to him; see Rich v. Basterfield, supra; King v. Pedley, 1 Ad. & El. 822, S. C. 3 Nev. & M. 627; King v. Moore, 3 Ad. & El. 184; Barnes v. Ward, Law Journal, Rep. C. P. 195, July, 1850; Fish v. Dodge, 4 Denio, 311; Mayor of N. Y. v. Bailey, 2 Denio, 433, per Walworth, Ch.

How far the doctrine of Bush v. Steinman will be adopted in this country is doubt-

Court of Exchequer, after fully considering the judgments given in Laugher v. Pointer, thought the weight of authority and legal principle was in favour of the view taken by Lord Tenderden and Mr. Justice Littledale, and decided accordingly that the hirer was *not* liable. And it was held, that the facts,—that the hirer always had the same driver, who was the only one his master kept, and always gave him a fixed *gratuity, and provided him with a livery, which he kept in the [*166] hirer's hall, and while he was hanging up which the accident happened, —made no difference in the hirer's liability.

The principle upon which Quarman v. Burnett was decided, has been frequently applied to other cases, in which a man has employed a person carrying on a distinct trade, or calling, to perform certain works for him, and an injury has been caused through the unskilfulness, negligence or default of the workmen employed by that person. In such a case the workmen are selected and employed by the *contractor*, and it would be obviously unjust to hold *his* employer, who had nothing to do with the selection of the workmen liable for the consequences of their unskilfulness or negligence.

Thus, where a butcher bought a bullock in Smithfield Market, and employed a licensed drover to drive it home, and the drover employed a boy, through whose negligence the bullock injured the plaintiff's property: it was held, that the butcher was not liable, as the drover exercised a distinct calling, and the boy who caused the mischief was *his* servant, not the servant of the butcher.(*q*) And so where a builder was employed to make certain alterations at a club-house, including the preparation and fixing of certain gas fittings, to do which he made a subcontract with a gas-fitter, through the negligence of whom, or his servants, the gas exploded and injured the plaintiff, the builder was held not liable, as the relation of master and servant did not exist between him and the party causing the injury.(*r*) So the commissioners of a navigation, who had entered into a contract with a person to do certain

(*q*) Milligan v. Wedge, 12 A. & E. 737. In this case Littledale, J., stated, that he retained the opinion he had expressed in Laugher v. Pointer. See Martin v. Temperley, 4 Q. B. 298, post, p. 170; and see also Reg. v. Hey, 2 Carr. & K. 983, where it was held, that a drover was a bailee and not a mere servant of the person who employed him, and therefore, that having sold some pigs entrusted to him, and absconded with the money, he could not be convicted of larceny, as he had no original intention of stealing the pigs.

(*r*) Rapson v. Cubitt, 9 M. & W. 710.

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ful. It has been questioned by Bronson, Ch. J. in Fish v. Dodge, 4 Denio's R. 311. It has been recognised in Massachusetts in the case of the Inhabitants of Lowell v. The Boston & Lowell R. R. Co. 23 Pick. 24; Earle v. Hall, 2 Met. R. 353. See also Mayor of N. Y. v. Bailey, 2 Denio's R. 433; Gardener v. Hartt, 2 Barb. S. C. Rep. 165.

For further illustration of the question who is the responsible master, see Sproul v. Hemmingway, 14 Pick. R. 1; Stone v. Codman, 15 Id. 297; Ross v. The Mayor of Madison, 1 Smith's (Ind.) Rep. 98.

An owner of land made an excavation therein, within two feet of a public street, and used no precaution against the danger of falling into it. A person in the night time fell into the excavation and was injured; and it was held that the owner was not liable; Howland v. Vincent, 10 Met. R. 871.

This case can hardly be reconciled with the case of Barnes v. Ward, cited supra. 2 Kent's Comm. p. 282, note to 7th ed.

works, were held not liable for an injury arising from the imperfect performance of part of those works, as the contractor *was not [*169] their servant.(s) So where a viaduct was being built by contractors for a railway company, under a deed, by which amongst other things, it was provided that the contractors were to do the work, but the company had a general right of watching the progress, and if the contractors employed incompetent workmen, the company had the power of dismissing them: the company were held not liable for injuries sustained by a workman who was killed by a heavy stone which fell from a travelling truck, through the negligence of some of the contractor's workmen whilst building the viaduct; as the workmen who caused the injury were not the servants of the company, and the power reserved to them, of dismissing incompetent workmen, did not make them responsible for the consequences of the contractors' employing such. And it was also held, that the defendants being the owners of the land on which the accident happened made no difference.(t)

So in another case, where a railway company entered into a contract(u with A. to construct a portion of their line. A. contracted with B., who resided in the country, to erect a bridge on the line. B. had in his employment C., who acted as his general servant and a surveyor, and had the management of B.'s business in London, for which he received an annual salary. B. entered into a contract with C., by which C. agreed for 40*l.* to erect a scaffold which had become necessary in building the bridge; but it was agreed that B. was to provide the requisite materials, and lamps, and other lights. The scaffold was erected upon the footway by C.'s workmen, and a portion of it improperly projected, and owing to that and the want of sufficient light, D. fell over it at night and was injured; but it was held, that D. could not maintain an action against B. for the injury thus occasioned, even though, *after the accident*, B. had caused other lights to be placed near the spot to prevent a recurrence of similar accidents.

Again, where certain commissioners(v) had contracted *with [*158] A. for all the paving required in a certain district, and A. contracted with B. to lay down a certain portion of it, and B.'s workmen left some paving stones at night in such a position as to constitute a public nuisance, and the plaintiff tumbled over them whilst on foot: it was held, that A. was not liable to an action at the suit of the plaintiff, as the injury was not caused by *his* workmen.

And similar principles were acted upon in a case which recently occurred in America.(w) A brig which was towed at the stern of a steamboat employed in the business of towing vessels in the river Mississippi below New Orleans, was, through the negligence of the master and crew of

(s) Allen v. Hayward, 7 Q. B. 960. See Clayards v. Dethick, 12 Q. B. 439.

(t) Reedie v. The London and North Western Railway Company, 4 Exc. 244; and see Glover v. The same Company, 5 Exc. 56, where the defendants were held not liable in trover for the acts of a contractor's workmen.

(u) Knight v. Fox, 5 Exc. 721.

(v) Overton v. Freeman, 21 L. J., N. S., C. P. 52.

(w) Sproul v. Hemingway, 14 Pick. R. 71. See Story on Ag. sect. 453 *c*, in a note to which is a long extract from the judgment of Chief Justice Shaw.

the steamboat, over whom those in charge of the brig had no control, brought into collision with a schooner lying at anchor in the river. A suit was brought by the owners of the schooner against the owners of the brig for the damages sustained by the collision; and the question was, whether the owner of the brig was liable therefor. It was held, upon full argument, that he was not, upon the ground that the master and crew of the steamboat were not the servants of the owner of the brig; were not appointed by him; did not receive their wages, or salaries from him; had no power to order or control them in their movements; and had no contract with the master and crew of the steamboat, but only through the master with the owners of the steamboat for a participation in the power of the steamer, derived from the public use and employment thereof by the owners.

But where a contractor is employed, his employer may, by *personal interference* with the workmen, adopt their acts, and so render himself liable where, ordinarily, he would not be so. As in the case of Burgess v. Gray,(*x*) in which it appeared that the defendant was *the proprietor of some newly built houses, which he had employed P. to [*169] build for him; and P. in forming a drain from premises belonging to the defendant at the back of the new houses to the common sewer, had, by his servants, caused a quantity of gravel to be deposited by the road side. The drain being finished, P. employed a person to carry away the gravel, and paid him so much a load, which he charged to the defendant; but the person so employed left some on the road, and the plaintiff, whilst driving in the evening along the road, ran upon the gravel left in the road, was upset and injured. The defendant's attention had been called to the gravel left in the road by a policeman, and he had promised to remove it as soon as he could, and after the accident said it was caused by the plaintiff's carelessness. On the part of the defendant it was, amongst other things, contended, on the principle of Quarman v. Burnett, that he was not liable, as he had employed a contractor; but it was nevertheless held, that, under the circumstances of the case, he *was* liable.

And unless a person who employs a contractor to do work for him has parted with the *whole control* of that work, he will still remain liable for the acts of that person and his workmen. In such case it must be assumed that he adopts all that is done in carrying on the work.(*y*)

But where a *master* is *obliged* by act of parliament *to employ a particular person*, and all power of selection is taken from him, it would be unjust to render him responsible for the wrongful acts of that person. Accordingly the Pilot Act,(*z*) which compels ship owners, &c. wanting a pilot to employ the first duly licensed pilot who shall offer himself, enacts,(*a*) that no owner of any ship shall be answerable for any damage

(*x*) 1 C. B. 578. The defendant in this case was held liable, partly on the ground that it did not appear that he had parted with the whole control of the work; and partly on the ground that he had sanctioned and adopted the act of the person who placed the gravel in the road. It is on the latter account that it is cited in the text. See, however, Knight v. Fox, 5 Exc. 721, ante, p. 167; and see also the cases of Trespass, post.

(*y*) Per Cresswell, J. in Burgess v. Gray, 1 C. B. 592.

(*z*) 6 Geo. 4, 125, s. 19. (*a*) Sect. 55.

which shall happen to any person by reason of the neglect or incapacity of any licensed pilot acting in the charge of such ship under any of the provisions of that act. The books contain numerous instances in which ship owners have been held not to be responsible for injuries caused by their vessel whilst under the command of a licensed pilot.(*b*) [*170] *And it has even been held,(*c*) upon the construction of the act of parliament, that a ship owner was not liable for injury caused by the negligent navigation of his ship whilst under the care of a pilot, although it was not compulsory upon him, under the circumstances, to employ a a pilot, as it was compulsory upon the pilot to serve if called upon, and he having been called upon had taken the control of the ship.

However, where a master has a power of selection, it makes no difference in his liability for the acts of the person selected that he is bound to select from a particular *class* of persons, however numerous or limited that class may be. Thus, although by the statute for regulating watermen and lightermen on the Thames,(*d*) and the bye-laws ordained in pursuance thereof, no one besides freemen, or apprentices to freemen or to widows of freemen, of the watermen and lightermen's company (with certain exceptions) may navigate craft on the river for hire, within the terms of the act, under a penalty; but any person may keep and use craft for carrying their own goods by their servants being such freemen or apprentices: and on board of every barge, &c., there must be, at least, one able and skilful man authorized by law to navigate; yet the owner of a barge, who hired two qualified persons to navigate it within the limits, was held liable for injury caused to another vessel by their negligence. And it was held to make no difference whether the navigators were hired for the job or by time.(*e*)

On that occasion, Patterson, J., said: "On the part of the defendant it is argued that this is the case, not of master and servant, but of an independent contract to perform the work, as in Milligan v. Wedge,(*f*) and Quarman v. Burnett.(*g*) But that is clearly erroneous. Independently of the act, the men navigating the barges would clearly be the defendant's servants. If the defendant, being at liberty to employ whom he pleased, engaged persons to manage his barge on the Thames, I cannot see how it is possible to contend that they were *not his servants, [*171] as much as a man whom he might employ to drive his carriage. Where, indeed, a man hires another man's servant from him, though such servant be employed to drive where the person hiring pleases, it has been held, in Quarman v. Burnett, that the servant so hired is not the servant of the person so hiring. That case certainly carried the exception a great way; but there the servant hired was ordinarily in the employment of the person from whom he was hired, and who let horses along with the driver. That case is not like the present. The second question, then,

(*b*) Bennet v. Moita, 7 Taunt. 258; and see cases cited in Lucey v. Ingram, 6 M. & W. 302; the case of the Maria, 1 W. Rob. Adm. R. 95, on the Newcastle Pilot Act, 41 Geo. 3, c. lxxxvi.

(*c*) Lucey v. Ingram, 6 M. & W. 302.

(*d*) 7 & 8 Geo. 4, c. lxxv.

(*e*) Martin v. Temperley, 4 Q. B. 298.

(*f*) 12 A. & E. 737.

(*g*) 6 M. & W. 499.

is as to the effect of stat. 7 and 8 Geo. 4, c. lxxv. That, indeed, confined the defendant to employing as his servants only individuals of a particular class. It narrowed the number of persons from whom he could select. But that is very different from the state of things created by the Pilot Act, where a party must take the first pilot who offers himself. Here the defendant had the power of selection, though from a limited number; and no case has gone so far as to decide that the person hired ceases to be the servant of the person hiring, if he is necessarily elected from a number, though limited. I was much struck by the argument deduced from the old statute of apprenticeship. According to the doctrine contended for on the part of the defendant, it would hardly have been possible while that act was in force to employ a man as a servant. I do not put the case on the largeness of the number from which the selection may here be made; the principle seems to me the same whether the number be five hundred or five thousand. If there be a power of selection, and not—as in the Pilot Act—a provision preventing any choice, the person hired is the servant of the person hiring."

There is a large class of cases which must not be entirely omitted here, but which it will be sufficient to refer to generally, as they do not properly relate to the law of master and servant, in which the *owners of fixed real property*, as land and houses, have been held *responsible* for the acts of *persons not*, strictly speaking, *their servants.*(1) The doctrine, however, on which these cases rest, has recently been placed within its proper limits, in a very elaborate judgment pronounced by Lord Cranworth,(*h*) in which he stated that, after full consideration, *he had come to the conclusion that no distinction in point of law [*172] existed, in cases like that under consideration between fixed property and ordinary moveable chattels, *unless, perhaps, in cases where the act complained of is such as to amount to a nuisance.*

We have hitherto been considering chiefly the liability of a master to answer for his servant's acts, in an action *on the case.* But a master may also, in many cases, be liable to an action of *trespass* for an injury caused by the *direct* act of his servant. The liability, however, of a master to be sued in this form of action, for injuries caused by his servant, does not depend upon the relationship of master and servant, though the existence of that relationship may, possibly, afford an a fortiori reason for holding the master responsible. His liability depends upon the fact that the act of trespass complained of was done by *his command;* that, in truth, it was *his own* act, although done through the instrumentality of his servant, according to the maxim qui facit per alium per seipsum facere videtur. For, although a man may be a trespasser by his *own* involun-

(*h*) Reedie v. London and Northwestern Railway Company, 4 Exc. 244, which was an action for damages sustained by a person passing under a viaduct in course of construction on the defendants' railway, and they were held not liable. In that case all the previous authorities will be found. See also Overton v. Freeman, 21 L. J., N. S., C. P. 52.

(1) See Earl v. Hill, 2 Metcf. Rep. 353; Elder v. Bemis, id. 599.

tary act,(*i*) no man can be made a trespasser against his will by the act of his servant. Unless, therefore, there be evidence of the concurrence of the master's will in the act of the servant, a master can, in no case, be treated as a trespasser for the act of his servant.(*k*)

If a master *expressly* order his servant to commit a trespass, there can be no doubt about the concurrence of his will in his servant's act, and no difficulty in treating him as a co-trespasser with his servant, and it can make no difference whether he himself were present or absent when the trespass was committed: if it were done by his orders, he would equally be a trespasser in either case.(1)

[*173] Again, if an act of trespass on the part of a servant, *be the *natural or necessary consequence* of an act which his master ordered to be done, his master will be liable to an action of trespass. And in this case also, the presence or absence of the master, at the time the trespass is committed can make no difference in his liability.

Thus, where(*l*) the defendant, who disputed the plaintiff's right of way through a yard, employed a labourer to law down rubbish in order to obstruct the way, but gave him orders not to let any of the rubbish touch the plaintiff's wall; the labourer executed those orders as nearly as he could, but some of the rubbish, it being of a loose kind, naturally shingled down towards and ran against the plaintiff's wall: the defendant was held liable in an action of *trespass*. And Littledale, J., said, "Where a servant does work by order of his master, and the latter imposes a restriction in the course of executing his order, which it is difficult for the servant to comply with, and the servant, in the execution of the order, breaks through the restriction, the master is liable in trespass. Suppose the case of two persons possessed of contiguous uninclosed land, and that the one of them desired his servant to drive his cattle, but not to let them go upon the land of his neighbour, and that the cattle went upon the land of the neighbour the master would be answerable in trespass, because he has only a right to expect from his servant ordinary, not extraordinary, care. If the servant, therefore, in carrying into execution the orders of his master, uses ordinary care, and an injury is done to another, the master is liable in trespass. If the injury arise from the want of ordinary care in the servant, the master will only be liable in case. Here the servant used ordinary care in the course of executing his master's order, and notwithstanding that, the rubbish ran against the wall."

And if an act of trespass be committed by a servant in the usual course of his employment, although there be no express command on the part of his master to do the specific act complained of, yet his master may be liable to an action of trespass, as in such case the command will be implied from the nature of the servant's employment. If, for instance, in

(*i*) Scott v. Shephard, 3 Wils. 403; 2 W. Bl. 892; Leame v. Bray, 3 East, 593; S. C. 5 Esp. 18; and see per Tindal, C. J., in McLaughlin v. Prior, 4 M. & G. 56.

(*k*) Morley v. Gaisford, 2 H. Bl. 442; McManus v. Crickett, 1 East, 106; per Tindal, C. J., in McLaughlin v. Prior, 4 M. & G. 58; Lyons v. Martin, 8 A. & E. 512.

(*l*) Gregory v. Piper, 9 B. & C. 591.

(1) See Johnson v. Barber, 5 Gilman's R. 425; Armstrong v. Cooley, id. 509.

the case of Lyons v. Martin,(*m*) the servant of the defendant had merely distrained the plaintiff's cattle damage feasant, there *can be no doubt the defendant would have been held liable in trespass for the consequences of his servant's act. [*174]

And if an act of trespass be committed by a servant on behalf and for the benefit of his master, it is perfectly clear that the master, although he gave no previous command to his servant to commit the trespass, may nevertheless render himself liable to an action of trespass by a subsequent ratification of the servant's act.(*n*)

But where an act of trespass has been committed by a servant without the orders of his master, the presence or absence of the master, at the time the act is done, forms a very material ingredient in considering whether or not the master is liable to an action of *trespass* for the act of his servant. For, if an act of trespass be committed by a servant in his master's *absence*, without his orders, there is no ground whatever for treating *the master* as a trespasser. He may be liable in another form of action, but he is not liable to an action of trespass, as his will did not concur in the act of his servant.(*o*)

But if an act of trespass has been committed by a servant in the *presence* of his master, if the master knew that his servant was about to commit a trespass, and did not restrain him, there may be ground for presuming the concurrence of his will in his servant's act, and he may be liable to an action of trespass, although he did not expressly order the trespass to be committed. For, as every master must be presumed to have power to control his servants, it may fairly also be presumed, from his knowing that his servant was about to commit a trespass, and not interfering to restrain him, that he concurred in his servant's act. Qui non prohibet, cum prohibere possit, jubet.

Thus, a gentleman who was *sitting by the side of his servant* in a gig which was driven by the servant, was *held liable to an action of *trespass* for injury caused by the horse running away, and dashing the gig against the church in Langham Place, as he had the immediate control over the servant. And Bayley, B., said, "the rule is this; if master and servant are sitting together, and the servant is driving the master, the act of the servant is the act of the master, and the trespass of the servant is the trespass of the master. Here the act is immediately injurious to the plaintiff, *and the master was present.*"(*p*) [*175]

If the act of the defendant or his servant be such as to amount to a trespass on his part, it is no objection to suing him in that form of action, that the damage sustained by the plaintiff was not caused immediately by the defendant's act; so as the damage be not too remote.

Thus where(*q*) it appeared that the plaintiff was driving with a friend

(*m*) 8 A. & E. 512. See this case, ante p. 160.

(*n*) See Eastern Counties Railway Company v. Broom, 6 Exc. 314. It that case an officer of the company took Broom into custody for breach of the company's by-laws, and took him before a magistrate; when the attorney of the company attended to prefer a charge against Broom: this was held not to amount to a ratification of the act of the officer; and see Roe v. Birkenhead, &c., Railway Company, 21 L. J., N. S., Exc. 9.

(*o*) McManus, v. Crickett, 1 East, 106. See Timothy v. Simpson, 6 C. & P. 499.

(*p*) Chandler v. Broughton, 1 C. & M. 29.

(*q*) Gilbertson v. Richardson, 5 C. B. 402.

along Oxford Street in a chaise drawn by a high spirited horse, and one of the traces getting accidentally over the shaft, he alighted for the purpose of adjusting it. While so doing, the defendant drove his carriage against the wheel of the plaintiff's chaise, and the plaintiff's friend was thrown by the shock off the seat on to the dashing board, which, falling on the horse, caused it to kick, whereby the chaise was damaged. It was held, that the defendant might be sued in *trespass* for the damage sustained.

But if the circumstances of the case do not show any exercise of volition, either express or implied, on the part of the *master*, he is *not liable* to be sued *in trespass* for the wilful act of his servant.(1)

Thus in Morley v. Gaisford,(*r*) which was an action on the *case* for injury sustained in consequence of the negligent driving of the defendant's servant, it was held that case and *not trespass* was the proper remedy, the Court saying, that "it was difficult to put a case where the master would be considered as a trespasser for an act of his servant, which was not done *at his command.*"

The point, however was more formally decided in McManus v. Crickett,(*s*) which was an action of trespass for forcibly driving the defendant's chariot against the plaintiff's chaise. It appeared that the defendant's servant *wilfully* drove the chariot againt the plaintiff's *chaise, [*176] but that the defendant wes not himself present,(*t*) nor did he in any manner direct or assent to the act of the servant. And it was held, that for this wilful and designed act of the servant, an action of *trespass* would not lie against his master. Lord Kenyon, C. J., after shewing from various old cases that a master was not liable in trespass for the wilful act of his servant, done without his command, said, "This doctrine does not at all militate with the case in which a master has been holden liable for the mischief arising from the negligence or unskilfulness of his servant, who had no purpose but the execution of his master's orders; but the form of those actions prove that this action of trespass cannot be maintained: for if it can be supported, it must be upon the ground that in trespass all are principals; but the form of those actions shews, that where a servant is in point of law a trespasser, the master is not chargeable as such; though liable to make a compensation for the damage consequential from his employing of an unskilful or negligent servant. The act of the master is the employment of the servant; but from that no immediate prejudice arises to those who may suffer from some subsequent act of the servant."

So again in Gordon v. Rolt,(*u*) which was an action of trespass for breaking the plaintiff's crane. The plaintiff had set up the crane in a dockyard with a view to its being tested, and, if approved of, ultimately purchased by government. The crane itself was not fixed to the soil, but

(*r*) 2 H. Bl. 442. (*s*) 1 East, 106.

(*t*) No one was in the carriage; the act was done by the servant either in going for, or after he had set down, his master.

(*u*) 4 Exc. 365; S. C. 7 D. & L. 87.

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(1) Vanderbelt v. The Richmond Trans. Co. 2 Cow. R. 479.

was placed in a socket which was so fixed. The defendant was the contractor for certain works then in progress in the dockward, and employed H. as a subcontractor. The workmen of H. broke the crane by using it to snap off the head of a pile which had been half sawn through. Cutting off the piles was part of the defendant's work under the contract but he had never given any authority to H. or his men to use the crane, nor did he know that they had used it. H. knew that his men occasionally used the crane, but he never authorised them to use it for any particular purpose. And it was held, that the defendant was not liable to an action of trespass for the act of H.'s workmen in *breaking the crane. In the course of the argument, Parke, B., said, "The [*177] result of the authorities is that if a servant, in the course of his master's employ, drives over any person, and does a *wilful* injury, the servant, and not the master, is liable in trespass; if the servant by his negligent driving, causes an injury, the master is liable in case: if the master himself is driving, he is either liable in case for his negligence, or in trespass because the act was wilful."

And again in Sharrod v. The London and North Western Railway Company,(*v*) which was also an action of trespass for driving a railway engine over, and killing the plaintiff's sheep.(1) The sheep had got on the railway in consequence of a defect of fences, and were run over by an express train, drawn by a locomotive engine driven by a servant of the company, who had directions to drive at a certain rate per hour. But it was held, that the company were not liable to an action of *trespass,* although the injury was caused by the *direct* act of their servants as they did not order him to drive over the sheep, nor was his doing so the necessary or probable consequence of executing the orders of the company. And Parke, B. said, "The immediate act which caused the damage to the plaintiff's cattle, was the impact of a machine which was under the control of a rational agent, the servant of the defendants; not so much so, indeed, as a horse, or carriage drawn by horses or propelled by mechanical power along an ordinary highway, would be, in which cases both the direction and the speed of the machine are under government,—but still in such a degree as to make the cases similar for the purpose of deciding the present question. We may treat the case, then, as if the damage had been done by an ordinary carriage drawn by horses; and it being now settled that an action of trespass will lie against a corporation,(*w*) we may consider, for the present purpose, the defendants as one natural person, and the carriage under the care of his servants. Now, the law is well established on the one hand, that whenever the injury done to the plaintiff results from the immediate force of the defendant himself, whether, intentionally or not, the plaintiff may bring an action of *trespass; on the other, that if the act be that of the servant, and be negli- [*178] gent—not wilful, case is the only remedy against the master. The maxim

(*v*) 4 Exc. 580; S. C. 7 D. & L. 213.
(*w*) See Maund v. The Monmouthshiae Canal Company, 5 M. & G. 452.

(1) See Vandegrift v. Rediker, 2 Am. Law Jour. 116.

'qui facit per alium, facit per se,' renders the master liable for all the negligent acts of the servant in the course of his employment; but that liability does not make the direct act of the servant the direct act of the master. Trespass will not lie against him; case will, in effect, for employing a careless servant; but not trespass, unless, as was said by the Court in Morley v. Gaisford,(x) the act was done '*by his command*;' that is, unless either the particular act which constitutes the trespass is ordered to be done by the principal, or some act which comprises it; or some act which leads, by a physical necessity, to the act complained of. The former is the case, when one, as servant, is ordered to enter a close to try a right, or otherwise; the latter, when such a case occurs as Gregory v. Piper,(y) where the rubbish ordered to be removed, from a natural necessity fell on the plaintiff's soil: but when the act is that of the servant in performing his duty to his master, the rule of law we consider to be—that case is the only remedy against the master, and then only is maintainable when that act is negligent or improper; and this rule applies to all cases where the carriage or cattle of a master is placed in the care and under the management of a servant—a rational agent. The agent's direct act is not the direct act of the master. Each blow of the whip, whether skilful and careful or not, is not the blow of the master; it is the voluntary act of the servant; nor can it, we think, be reasonably said, that all the acts done in a skilful and careful conduct of the carriage are those of the master, for which he is responsible in an action of trespass, to the same extent as if he had given them himself, because he has impliedly ordered them; but those that were careless and unskilful were not, for he has given no order except to use skill and care.

"Our opinion is, that in all cases where a master gives the direction and control over a carriage, or animal, or chattel, to another rational agent, the master is only responsible in *an action on the case* for want of skill or care of the agent,—no more: consequently, this action cannot be supported.

"We should observe, that though the master in this case is taken to have ordered the driver of the engine *to proceed at a great speed, [*179] it did not follow, as a *necessary* consequence, that it would impinge on the plaintiff's cattle. It might not have happened, if the driver had seen the cattle sooner, or the cattle had heard the engine and got out of the way. The act, therefore, cannot be treated as a trespass on the ground that it was, by necessary implication, ordered to be done by the defendants—the principle on which the case of Gregory v. Piper, was decided. This is the simple case of an act done by the servant in the course of his employment, not specifically ordered by the master: and though the injury by such an act be direct, so far as relates to the servant, we have recently held that a master would not be responsible in trespass."(z)

So it has been held,(a) that a railway company was not liable to an

(x) 2 H. Bl. 442. (y) 9 B. & C. 591, ante, p. 173.

(z) Gordon v. Rolt, 4 Exc. 365; S. C. 7 D. & L. 87, ante, p. 176.

(a) Roe v. The Birkenhead, Lancashire and Cheshire Junction Railway Company, 21 L. J., N. S., Exc. 9. In this case a letter written by the solicitor to the company, with a view to a compromise, was held not to be evidence of ratification by the company of the act done.

action of trespass for an arrest of the plaintiff by one of the officers of the company (for non-payment of an excess of fare claimed, but not due,) as there was no proof of an authority, either express or implied, given by the defendants, or of any ratification by them of the act done.

The same principles which render a man liable to be sued in an action of trespass for the wrongful act of his servant, will also render him liable to be sued in that form of action for the wrongful act of one who is not, strictly speaking, his servant. Thus, where(*b*) the defendant, who, togegether with a party of friends, had hired a carriage and four horses, driven by two postilions in the service of the owner of the horses, to go to Epsom, rode on the box of the carriage, and in going through a toll-bar, at which there was a crowd, called out to the postilion on the leader, "Go in there!"—pointing to a position in front of a gig in which the plaintiff was riding, which belonged to, and was driven by M.,—and the postilion pushed his horses forward, and, in doing so, upset the gig, and the plaintiff and M. fell out. Some one in the carriage called out, "Go on! Go on!" but M. got up, stopped the horses, and would not allow the *carriage to proceed, although the defendant offered to settle then, until the defendant gave his card, saying that he would be [*180] answerable for all that had occurred, if M. would allow him to proceed. The defendant was held liable in trespass for the injury sustained by the plaintiff; although, according to the decision before adverted to in the case of Quarman v. Burnett, the postilions could not be considered as his servants: Erskine, J. saying, "The cases in which it has been decided that *case* will not lie against the hirer of a carriage and horses for the misconduct of the driver, not being his servant, do not apply here; for this is an action treating the defendant as a co-trespasser, and is not brought against him as a master for the misconduct of his servant."

An *exception*, however, to the general rule, which renders a man responsible, in a civil action, for the tortious acts of those employed by or under him, is to be found in the case of *public officers*, such as the Postmaster General, the Lords Commissioners of the Treasury, the Commissioners of the Customs and Excise, the Auditors of the Exchequer, &c., who are *not liable* for any negligence or misconduct of the *inferior officers* in their several departments.(*c*) The principle upon which their non-liability depends, was settled in the year 1699, in an action brought against the Postmaster General for the loss of a letter containing Exchequer bills, by the negligence of his servants and deputies: and three judges against Lord Holt held, that the plaintiff was *not* entitled to recover.(*d*) The ground of the opinion of the three judges appears to have been, that the Post Office establishment is a branch of the public police created by statute for purposes of revenue as well as for public convenience, and that the government have the management and control of the

(*b*) McLaughlin v. Pryor, 4 M. & G. 48.

(*c*) Cowp. 766. See Story on Ag. sect. 319. The subordinates themselves, however, may be responsible; Rowning v. Goodchild, 3 Wils. 443; S. C. 2 W. Bl. 906; Stock v. Harris, 5 Burr. 2709, post, p. 218.

(*d*) Lane v. Cotton, 2 Ld. Raym. 646; S. C. 12 Mod. 482. See Winterbottom v. Wright, 10 M. & W. 109.

whole concern. It is, in short, a government instrument, established for its own great purposes. The postmasters enter into no contracts with individuals, and receive no hire, like common carriers, in proportion to the risk and value of *the letters under their charge, but only a [*181] general compensation from government. The same question was again still more elaborately discussed in a case in the time of Lord Mansfield,(e) brought against the Postmaster General to recover the amount of a bank note, stolen out of a letter by one of the sorters of letters, when the court adhered to the doctrine of the three judges in Lane v. Cotton against the opinion of Lord Holt.(f)

And Lord Mansfield said, "The ground of Lord Chief Justice Holt's opinion in that case, is founded upon comparing the situation of the postmaster to that of a common carrier, or the master of a ship taking goods on board for freight. Now, with all deference to so great an opinion, the comparison between a postmaster and a carrier, or the master of a ship, seems to me to hold in no particular whatever. The postmaster has *no hire*, enters into *no contract*, carries on *no merchandize or commerce*. But the post office is a *branch of revenue*, and a *branch of police*, created by act of parliament. As a branch of revenue there are great receipts; but there is likewise a great surplus of benefit and advantage to the public, arising from the fund. As a branch of police, it puts the whole correspondence of the kingdom (for the exceptions are very trifling) under government, and entrusts the management and control of it to the crown, and officers appointed by the crown. There is no analogy, therefore, between the case of the postmaster and a common carrier."(g)

Upon similar principles the captain of a man-of-war has been held not responsible for damage done to another vessel by his ship, during the watch of the first lieutenant, who was on deck and had the direction of the ship: the captain not being on deck, nor called upon by his duty to be so, as he did not appoint the officers or crew, and had no choice whether he would serve with them or not, and had no power of dismissal over them. They were, in fact, all servants of the same master.(h)

But this exception would not apply so as to exempt a person, who was a public officer, from responsibility for the act of one who *was* his own servant. And, therefore, in Lord North's case,(i) where it appeared that *King Edward VI. sold a quantity of lead, and appointed Lord [*182] North, who was Chancellor of his Court of Augmentations, to take bond for payment of the money, and Lord North ordered his clerk to take the bond, which was done, and the bond delivered to Lord North, who gave it back again to his clerk, in order to send it to the clerk of the Court of Augmentations, but Lord North's clerk suppressed the bond: it was the opinion of all the judges of England that Lord North was chargeable to the king.

Another exception, to the general rule above stated, is to be found in that class of cases in which commissioners, appointed under acts of parlia-

(e) Whitfield v. Lord Le Despencer, Cowp. 754. (f) P. 764.
(g) See Story on Bailm. sect. 462; Story on Ag. sect. 319, note (2).
(h) Nicholson v. Mouncey, 15 East, 384.
(i) Dyer, 161. See Boson v. Sandford, 3 Mod. 323.

ment, for local purposes, such as commissioners of sewers,(*k*) paving commissioners,(*l*) navigation commissioners,(*m*) &c., and trustees of turnpike roads,(*n*) have been held not responsible for damage done by persons acting under their orders, in carrying into effect the purposes for which they were appointed.(*o*) In such cases the commissioners, &c., are held not responsible for the consequences of acts which they are authorised to do,(*p*) if done, so *far as they are concerned, with due care and [*183] attention, nor are they responsible for the negligent execution of orders properly given. If they *exceed* their powers they are, of course, liable;(*q*) and so they are if they act wantonly and oppressively,(*r*) or *maliciously*,(*s*) or even carelessly and negligently(*t*) in the exercise of their powers.

The cases in which these principles have been applied are numerous,(*u*) but these principles cannot be better explained than is done by Lord Wynford in his admirable judgment in the case of Hull v. Smith (*v*) That was an action on a case for negligently leaving a ditch, or tunnel, open, into which the plaintiff fell and was injured. The defendants were the clerks to the commissioners for paving, &c., Birmingham, (who, by act of parliament, might be sued in the name of their clerks), the surveyor, the contractor, and a workman, who was in the ditch when the

(*k*) Jones v. Bird, 5 B. & Ald. 844; and see Clayards v. Dethick, 12 Q. B. 439.

(*l*) Leader v. Moxton, 2 W. Bl. 924; S. C. 3 Wils. 461; Governor, &c., of Cast Plate Manufacturers v. Meredith, 4 T. R. 794; Hall v. Smith, 2 Bing. 156.

(*m*) Allen v. Hayward, 7 Q. B. 968, note.

(*n*) Sutton v. Clarke, 6 Taunt. 29; Harris v. Baker, 4 M. & S. 26; Duncan v. Findlater, 6 Cl. & Fin. 903.

(*o*) As to the proper mode of recovering from such commissioners salary due to officers appointed by them, such as a street-keeper by paving commissioners. See Bogg v. Pearse, 2 L. M. & P. 21.

(*p*) Protection is sometimes given by acts of parliament to persons acting in pursuance of them. A person is entitled to that protection who acts bona fide and in the reasonable belief that he is pursuing the act of parliament, although he is really not doing so; for, as observed by Pollock, C. B., in Hughes v. Buckland, one who acts in perfect execution of the act of parliament does not stand in need of protection. The protection is required by him who acts illegally, but under the belief that he is right. See Parton v. Williams, 3 B. & Ald. 330; Hughes v. Buckland, 15 M. & W. 346; S. C. 3 D. & L. 702; Huggins v. Waydey, 15 M. & W. 357; Davis v. Curling, 8 Q. B. 286; Smith v. Hopper, 9 Q. B. 1005; Kine v. Evershed, 10 Q. B. 143; Horn v. Thornborough, 3 Exc. 846; S. C. 6 D. & L. 651; Gosden v. Elphick, 4 Exc. 445; S. C. 7 D. & L. 194; Munday v. Stubbs, 1 L. M. & P. 675. See also Kent v. Great Western Railway Company, 4 D. & L. 481; S. C. 3 C. B. 714, et cas. ib. cit.; Booth v. Clive, 2 L. M. & P. 283. Where powers are given by local acts to trustees or commissioners, bona fides is immaterial, although it seems to be sufficient to entitle them to the protection of the statute, if they are trustees, &c., de facto; Harrison v. Varty, Q. B., Trin. T. 1845, cited by Parke, B., in Hughes v. Buckland, 15 M. & W. 356; Braham v. Watkins, 4 D. & L. 42; S. C. 16 M. & W. 77. But where protection is given to a person filling a particular character, he must, to entitle himself to protection, fill that character at least de facto. It is not sufficient for him to *think* he fills it; Hopkins v. Crowe, 4 A. & E. 774.

(*q*) Jones v. Bird, 5 B. & Ald. 844.

(*r*) See per Gibbs, C. J., in Sutton v. Clarke, 6 Taunt. 43; per Bayley, J., in Boulton v. Crowther, 2 B. & C. 709.

(*s*) See Acland v. Buller, 1 Exc. 837.

(*t*) Jones v. Bird, 5 B. & Ald. 844. See 2 B. & C. 711.

(*u*) See, in addition to the cases cited in Hull v. Smith in the text, Boulton v. Crowther, 2 B. & C. 703; Duncan v. Findlater, in Dom. Proc. 6 Cl. & Fin. 903; Allen v. Hayward, 7 Q. B. 968, note; Pilgrim v. Southampton, &c., Railway Company, 7 C. B. 205, 228.

(*v*) 2 Bing. 156. See Parnaby v. The Lancaster Canal Company, 11 A. & E. 223.

accident happened. The jury found a verdict for the workman, and against all the other defendants; but the verdict against the clerks to [*184] *the commissioners was afterwards set aside, and a verdict ordered to be entered for them. And Lord Wynford said: "This action is not maintainable against these defendants (the clerks), unless it could have been supported against the commissioners. It was not disputed, that the commissioners were authorized by the act to order the tunnel to be made which occasioned the injury to the plaintiff. No negligence was imputed to the commissioners themselves. They had ordered the tunnel to be made, and left the making of it to the defendants N. and K., the former of whom was the surveyor, and the latter the undertaker of the work. The accident happened to the plaintiff from these persons not putting up rails, and not leaving lights during the night, to prevent persons passing along the road in which the tunnel was made from falling into it. These commissioners are charged with the execution of a public duty, for the performance of which they receive no emolument or advantage. They must employ such persons as N. and K. to do the works which the act of parliament orders to be done, and the commissioners cannot be expected continually to watch such persons whilst so employed. We think, under these circumstances, that the commissioners are not responsible for the accident that has happened, and that the action cannot be maintained against their clerks; but the party injured must have his remedy against the agents of the commissioners, by whose negligence it was occasioned. . . . If commissioners under an act of parliament order something to be done which is not within the scope of their authority, or are themselves guilty of negligence in doing that which they are empowered to do, they render themselves liable to an action; but they are not answerable for the misconduct of such as they are obliged to employ. If the doctrine of respondeat superior were applied to such commissioners, who would be hardy enough to undertake any of those various offices, by which much valuable, yet unpaid, service is rendered to the country? Our public roads are formed and kept in repair, our towns paved and lighted, our lands drained and protected from inundation, our internal navigation has been improved, ports have been made and are kept in order, and many other public works are conducted by commissioners who act spontaneously. Such commissioners will act no longer, if they are to make amends from their own fortunes for the conduct [*185] of such as must be employed under them. *It would be much better that an individual injured by the act of an agent should endure the injury unredressed, than that the zeal of the most useful members of the community should be checked by subjecting them to a responsibility for agents, from whose services they derive no benefit, and who are seldom under the immediate control of their employers whilst they are employed on the works they are ordered to do. The commissioners, taking the advice of their surveyors and engineers, are to direct what tunnels or other works are to be made. Few commissioners know how such works should be executed: they ought not, therefore, to be answerable for an imperfect execution of them, nor can it be expected that they shall attend day by day to see that proper precautions are ta-

ken against accidents, or get up in the night to see that lights are burned to warn passengers of the danger from temporary obstructions in the roads. If by taking their office of commissioners they have not undertaken the performance of these duties, with what justice can they be charged with the consequence of the neglect of them? The maxim of respondeat superior is bottomed on this principle, that he who expects to derive an advantage from an act which is done by another for him, must answer for any injury which a third person may sustain from it. This maxim was first applied to public officers by the stat. of West. 2, c. 11, from the words of which statute it is taken: 'Si custos gaolæ non habeat per quod justicietur vel unde solvat, respondeat superior suus qui custodiam hujusmodi gaolæ sibi commisit.'

"The terms of the stat. of West. 2 embrace only those who delegate the keeping of gaols to deputies, and were intended only, as Lord Coke tells us,(*w*) to apply 'to those who, having the custody of gaols of freehold or inheritance, commit the same to another that is not sufficient.' The principle of the statute has, however, since been extended to sheriffs, who are responsible for their undersheriffs and bailiffs, but has not been applied to any other public officer. Although the office of sheriff be now a burthensome one, yet they are entitled to poundage and other fees for acts done by their officers, which, in old time, might be a just equivalent for their responsibility. In Bowcher v. Noidstrom,(*x*) Lawrence, J., *mentions the case of the captain of the Russell man-of-war, who was held answerable for the act of one of the lieutenants, who had [*186] command of the watch, in running down an Indiaman whilst the captain was asleep in his cabin. When or by whom that case was decided I do not know; but it is supported by no other decision that I am aware of, and its authority is shaken by the judgment of the case in which it is cited. The actions in the case of Leader v. Moxon,(*y*) Jones v. Bird,(*z*) The Plate Glass Company v. Meredith,(*a*) were not brought against the commissioners, but against those who did the acts complained of. In the latter case,(*b*) I adverted to that circumstance, as distinguishing it from Sutton v. Clarke.(*c*) If the counsel who advised the bringing of these actions had thought they could have been maintained against the commissioners who gave the orders for the works that occasioned the injuries of the plaintiffs, the commissioners would have been included. Schinotti v. Bumsted(*d*) is distinguishable from this case; there the negligence was brought home to the commissioners of the lottery, who were the defendants, and they were compensated for their services and were bound to pay due attention to their duty. The commissioners here had authority to make the trench which occasioned the damage to the plaintiff. The Plate Glass Company v. Meredith, already referred to, shews that no action could be maintained against them for what they are authorized to do, although an individual sustain an injury from what has been done. The

(*w*) 2 Inst. 382.

(*x*) 1 Taunt. 568. See Nicholson v. Mouncey, 15 East, 384, ante, p. 181, where the captain of a man-of-war was held *not* liable under similar circumstances.

(*y*) 2 W. Bl. 924.

(*z*) 5 B. & Ald. 844.

(*a*) 4 T. R. 794.

(*b*) His lordship means Jones v. Bird.

(*c*) Marsh. 429; S. C. 6 Taunt. 29.

(*d*) 6 T. R. 646.

passage into the plaintiff's premises, in that case, was rendered impassible with carts by the raising of pavement by the order of the commissioners. Lord Kenyon says, 'If this action could be maintained, every turnpike act, paving act, and navigation act would give rise to an infinity of actions. The parties are without remedy, provided the commissioners do not exceed their jurisdiction.' In Sutton v. Clarke, the defendant, as a trustee under a turnpike act, who was duly authorized to make a drain, [*187] had ordered such drain to be cut in an *improper manner; he had, however, given this order after having taken the best advice that could be obtained. Lord Chief Justice Gibbs considered that circumstance as distinguishing the case from that of The British Plate Glass Company, where what was done could not be done in any other manner than that in which it was done; but still his lordship and the rest of the Court held, that as the defendant acted according to the best of his judgment, and with the best advice, he was not answerable for the injury; and he added, "This case is perfectly unlike that of an individual who makes an improvement in his own land, from which an injury occurs to another; such person must answer for the injury, because he was *acting for his own benefit.* In Harris v. Barker,(e) the clerk to commissioners for making a road under an act, which contained a clause directing actions to be brought against such clerk for acts done by the trustees, was holden not to be liable to an action for an injury sustained in consequence of heaps of dirt being left by the side of the road, and no lights being placed to enable persons to avoid such heaps. In this case there was, as in that now before us, great negligence in those employed by the trustees.

"From these cases I collect, that the law recognises the principles which I ventured to state were founded in sound policy and justice, and and that no action can be maintained against a man acting gratuitously for the public, for the consequence of any act which he was authorized to do, and which, so far as he is concerned, is done with due care and attention, and that such a person is not answerable for the negligent execution of an order properly given."

Another exception to the general responsibility of a master for the tortious acts of his servant, is established by the cases in which it has been held, that a master is not responsible to his own servant for any injury happening to him through the negligence or wrongful act of a fellow-servant.(1) In order, however, to bring a case within this exception, it must appear that both the servant injured and the wrongdoer were, at the time the injury was done, acting in the service of the common master, and also that the wrongdoer was a person of ordinary skill [*188] and care. But where these circumstances *concur, the party injured has his remedy solely against the wrongdoer himself, and not against his master.(f)

The first case in which this question arose was that of Priestley v. Fow-

(e) 4 M. & S. 27.

(f) See Story on Ag. sect. 453 *d*.

(1) See Farwell v. R. R. 4 Metcalf. R. 49; Brown v. Maxwell, 6 Hill, 594; Murray v. R. R. Co. 1 McMullan's R. 385; Coon v. R. R. Co. 6 Barb. 231.

ler.(*g*) The plaintiff was a servant of the defendant in his trade of a butcher, and the defendant desired the plaintiff to go with certain goods of the defendant in a van belonging to the defendant, and conducted by another servant. The plaintiff accordingly went, but the van, being overloaded, broke down, and the plaintiff, who was riding on it, was thrown off, and his thigh broken. It did not appear whether the defendant *knew* of the defects in, or overloading of the van; the Court, therefore, was not called upon to decide how far such knowledge on his part of a defect, unknown to the servant, would make him liable. But, under the circumstances, he was held *not* liable: Lord Abinger, C. B., saying, "If the master be liable to the servant in this action, the principle of that liability will be found to carry us to an alarming extent. He who is responsible by his general duty, or by the terms of his contract, for all the consequences of negligence in a matter in which he is the principal, is responsible for the negligence of all his inferior agents. If the owner of the carriage is, therefore, responsible for the sufficiency of his carriage to his servant, he is responsible for the negligence of his coachmaker, or his harnessmaker, or his coachman. The footman, therefore, who rides behind the carriage, may have an action against his master for a defect in the carriage owing to the negligence of the coachmaker, or for a defect in the harness arising from the negligence of the harnessmaker, or for drunkenness, neglect, or want of skill in the coachman; nor is there any reason why the principle should not, if applicable in this class of cases, extend to many others. The master, for example would be liable to the servant for the negligence of the chambermaid, for putting him into a damp bed; for that of the upholsterer, for sending in a crazy bedstead, whereby he was made to fall down while asleep and injure himself; for the negligence of the cook, in not properly cleaning the copper vessels used in the kitchen; of the butcher, in supplying the *family with meat of a quality injurious to the health; of the builder, for a defect in the foundation of the house, whereby it fell, and injured both the master and the servant by the ruins. [*189]

"The inconvenience, not to say the absurdity, of these consequences, afford a sufficient argument against the application of this principle as to the present case. But in truth, the mere relation of the master and the servant never can imply an obligation on the part of the master to take more care of the servant than he may reasonably be expected to do of himself. He is no doubt bound to provide for the safety of his servant, in the course of his employment, to the best of his judgment, information, and belief. The servant is not bound to risk his safety in the service of his master, and may, if he thinks fit, decline any service in which he reasonably apprehends any injury to himself; and in most of the cases in which danger may be incurred, if not in all, he is just as likely to be acquainted with the probability and extent of it as the master. In that sort of employment especially, which is described in the declaration in this case, the plaintiff must have known, as well as his master, and probably better, whether the van was sufficient, whether it was over-

(*g*) 3 M. & W. 1. See Winterbottom v. Wright, 10 M. & W. 109; Brown v. Mallett, 5 C. B. 599, 616; Seymour v. Maddox, 20 L. J., N. S., Q. B. 327.

loaded, and whether it was likely to carry him safely. In fact, to allow this sort of action to prevail, would be an encouragement to the servant to omit that diligence and caution which he is in duty bound to exercise on the behalf of his master, to protect him against the misconduct or negligence of others who serve him; and which diligence and caution, while they protect the master, are a much better security against any injury the servant may sustain by the negligence of others engaged under the same master, than any recourse against the master for damages could possibly afford. We are therefore of opinion, that the judgment ought to be arrested."

The principles upon which the case of Priestley v. Fowler was decided, have been recently supported and followed by the Court of Exchequer in two other cases of a similar nature, the former of which it will be convenient to mention at some length, as the principles involved are of extensive application. That was the case of Hutchinson v. The York, Newcastle and Berwick Railway Company.(*h*) The nature of the case sufficiently *appears from the judgment of Alderson, B., who said, [*190] "The question is, whether the defendants are liable for the injury occasioned to one of their own servants by a collision, while he was travelling in one of their carriages in discharge of his duty as their servant; in respect of which injury they would undoubtedly have been liable if the party injured had been a stranger, travelling as a passenger for hire. We think that they are not. This case appears to us to be undistinguishable in principle from that of Priestley v. Fowler." His lordship then proceeded to state that case; to explain the principle upon which a master is, in general, liable for accidents resulting from the negligence or unskilfulness of his servant, and to show that a servant could not recover against his master for any injury sustained in consequence of his own unskilfulness or negligence. He then continued: "The difficulty is, as to the principle applicable to the case of several servants employed by the same master, and an injury resulting to one of them from the negligence of another. In such a case, however, we are of opinion that the master is not, in general responsible. Put the case of a master employing A. and B., two of his servants, to drive his cattle to market: it is admitted, if, by the unskilfulness of A., a stranger is injured, the master is

(*h*) 5 Exc. 343; S. C. 19 L. J., N. S., Exc. 296. A case of a very similar character has recently occurred in America; and the decision was similar to that in the text. But although it occurred previously to that in the text, it does not appear to have been cited in that case either by the counsel or the Court. See Farwell v. The Boston and Worcester Railroad Corporation, 4 Metc. Rep. 49. In that case two persons were employed by the defendants in their business, the one as an engineer, to manage the engines and cars on the road, the other, to manage the switches on the railway. The latter, although he was properly selected by the company as a person of due skill and reasonable diligence, negligently put or left a switch across the railway, whereby the engine and cars were thrown off the line and the engineer was severely injured. He brought an action for the injury sustained against the company, but it was held, upon full argument, that the action was not maintainable, but should have been brought against the wrong-doer himself. Mr. Chief Justice Shaw, in delivering judgment, went into an elaborate examination of the whole subject, and among other authorities cited, with approval, the case of Priestley v. Fowler. See Story on Ag. sect. 453 *e*, note (1).

responsible; not so if A., by his *unskilfulness, hurts himself; he cannot treat that as the want of skill of his master.(*i*) Suppose, [*191] then, that by the unskilfulness of A., B., the other servant, is injured, while they are jointly engaged in the same service; there, we think, B. has no claim against the master; they have both engaged in a common service, the duties of which impose a certain risk upon each of them, and in case of negligence on the part of the other, the party injured knows that the negligence is that of his fellow-servant, and not of his master. He knew when he was engaged in the service, that he was exposed to the risk of injury, not only from his own want of skill or care, but on the part of his fellow-servant also, and he must be supposed to have contracted on the terms that, as between himself and master, he would run that risk. Now, applying these principles to the present case, it follows that the plaintiff has no title to recover. H., the deceased,(*k*) in the discharge of his duty as one of the servants of the defendants, had put himself into one of their railway carriages under the guidance of others of their servants, and by the neglect of those other servants, while they were engaged together with him in one common service, the accident occurred. This was a risk which H. must be taken to have agreed to run when he entered into the defendants' service, and for the consequences of which, therefore, they are not responsible. The declaration, indeed, states the accident to have arisen from the combined neglect of the servants who were managing the carriages in which the deceased was travelling, and other of their servants who were managing the train with which the plaintiff's carriage came into collision; and it was argued that this allegation is divisible, and, in order to sustain the declaration, it would not be necessary to prove any negligence on the part of the train in which H. was travelling; but it would be sufficient to prove negligence on the part of the other train, and so it was contended, that even admitting the defendants would not be liable for any neglect [*192] *on the part of those who were managing the train in one of the carriages of which A. was travelling, yet there could be no principle exempting them from liability for the acts of those who, though equally with H. servants of the defendants, were not at the time of the accident engaged in any common act of service with him. But we do not think there is any real distinction between the two cases. *The principle is, that a servant when he engages to serve a master, undertakes as between himself and his master to run all the ordinary risks of the service, and this includes the risk of negligence upon the part of a fellow-servant, when he is acting in the discharge of his duty as servant of him who is the common master of both.* The death of H. appears on these pleadings to have happened while he was acting in the discharge of his duty to the defendants as his masters, and to have been the result of carelessness on the part of one or more other servant or servants of the same masters, while

(*i*) Semble, the non-liability of the master in *that* case would proceed from the principle of avoiding circuity of action,—as the servant himself would be liable over again to his master,—an objection which would not apply to holding a master responsible to one servant for the tortious acts of another.

(*k*) The action was brought by his administratrix under the stat. 9 & 10 Vict. c. 93.

engaged in their service. And whether the death resulted from mismanagement of the one train, or of the other, or both, does not affect the principle; in any case it arose from carelessness or want of skill, the risk of which the deceased had as between himself and the defendants agreed to run. It may, however, be proper, with reference to this point, to add that *we do not think a master is exempt from responsibility to his servant for an injury occasioned to him by the act of another servant where the servant injured was not at the time of the injury acting in the service of his master.* In such a case, the servant injured is substantially a stranger, and entitled to all the privileges he would have had if he had not been a servant. It was contended that the plea in this case(*l*) is bad on special demurrer, as being but an argumentative denial of the cause of action stated in the declaration: but this objection is unfounded. Though we have said that a master is not responsible generally to one servant for an injury caused to him by the negligence of a fellow-servant while acting in one common service, yet this must be taken with the qualification that the *master shall have taken care not to expose his servants to unreasonable risks.* The servant, when he engages to run the risk of his service, [*193] including *those arising from the negligence of fellow-servants, has a right to understand that the master has taken reasonable care to protect him from risk by associating him only with persons of ordinary skill and care; and the real object of the plea in this case is, to show that the defendants had discharged a duty, the omission to discharge which might have made them responsible to the deceased. The plea, therefore, appears not to be open to the objection insisted on. For these reasons we are of opinion that the plaintiff has shown no ground of action, and so our judgment must be for the defendants."

The other case above referred to is Wigmore v. Jay,(*m*) in which, upon similar principles, it was held that a master builder was not liable to an action at the suit of the administratrix(*n*) of a bricklayer, who was killed by reason of the falling of the scaffold on which he was working. The scaffold was erected under the superintendence of the defendant's foreman, the defendant not being present, and was constructed by the men in the employ of the defendant, the deceased not being one of them: and the falling of the scaffold was caused by the unsoundness of one of the ledgers or horizontal poles employed in its construction.

(*l*) The plea in substance was, that the collision took place solely by the negligence &c., of the defendants' servants, who were severally fit and competent persons.

(*m*) 5 Exc. 354; S. C. 19 L. J., N. S., Exc. 300; and see Seymour v. Maddox, 20 L. J., N. S., Q. B. 327, where it was held that the manager of a theatre was not liable to an action at the suit of a singer for injuries sustained by him in falling through a hole the stage.

(*n*) This action was also brought under the stat. 9 & 10 Vict. 93.

*CHAPTER VI. [*194]

THE LIABILITY OF A SERVANT TO THIRD PERSONS FOR ACTS DONE ON BEHALF OF HIS MASTER.

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IN CASES OF CONTRACT.

GENERALLY speaking, a servant who having authority to do so, enters into a contract in his master's name, is not himself personally liable upon such contract,(*a*) though he *may* undoubtedly, like any other agent, contract in such a manner as to make himself personally liable.(*b*)

In order to make a servant liable personally on a contract made in his master's name, there must be some wrong or omission of right on the part of the servant.(*c*) Thus, if he do not possess authority from his master to contract in his name, or, which is in effect the same thing, if he exceed the authority given him, and fraudulently misrepresent his authority, there can be no doubt that he will be personally liable to the person with whom he deals in his master's name. If, however, the person *dealing with him *knows* of his want of authority, and yet [*195] chooses to charge the master, it would seem that the servant could not afterwards be made liable in the event of the master failing to pay.(*cc*) Questions of this sort frequently resolve themselves into mere questions of credit. To whom was the credit given? The answer to which must depend upon the circumstances of the case. If the credit was given to the master, the servant could not be made liable, provided he had authority to contract. But if the credit was given to the servant, even for goods supplied for his master's use, he could not discharge himself from liability on the ground that he was a mere agent. A servant would also be liable, if, at the time he entered into a contract, he did not disclose his master's name, and it was not known to the party contracting with him, although he was known to be a mere agent.(*d*)

But where a servant has once had authority to contract in his master's name, and the authority is revoked without his knowledge, he would not be liable upon contracts entered into in his master's name, in ignorance

(*a*) Paley on Ag. 368; Story on Ag. 261; Ex parte Hartopp, 12 Ves. 352; Owen v. Gooch, 2 Esp. 567.

(*b*) Per Ashurst, J., in Mackbeath v. Haldimand, 1 T. R. 181; per Bayley, J., in Thomson v. Davenport, 9 B. & C. 88, and in Burrell v. Jones, 3 B. & Ald. 50.

(*c*) Smout v. I berry, 10 M. & W. 1.

(*c*) Paterson v. Grandasqui, 15 East, 62; S. C. 2 Smith's L. C. 198.

(*d*) So in the case of auctioneers; Hanson v. Roberdeau, Peake, 163; Franklyn v. Lamond, 4 C. B. 637.

of the revocation of his authority. If, for instance, a man leaves a housekeeper in possession of his house, and goes abroad and dies, the housekeeper would not be liable to pay for goods obtained on her master's credit after his death, and before she knew of his death, provided they were of a description which she *was* authorized by her master to pledge his credit for during his life:(*e*) although in such case her master's representatives would not be liable, as her authority to pledge his credit was in fact revoked by his death.(*f*)

Where clerks or other servants enter into written contracts on behalf of their employers, they should be careful to do so in such a manner as to exclude the possibility of their being personally liable themselves upon such contract, in the event of their employer failing to perform the engagements thus entered into. For if such a contract purport on the face of it to bind the clerk, or party signing it, himself personally, [*196] it is not *competent for him to discharge himself from liability by evidence that he was merely acting in a ministerial capacity, as agent for his employer.(*g*) To exempt himself from personal responsibility, a clerk should either sign his employer's name, or, if he sign his own, should expressly state his ministerial character, as by using the words "pro procuration," or other words of a similar import.

The necessity of the above caution is exemplified by the following cases, in which clerks have been held personally liable upon bills of exchange accepted or drawn for the benefit of their employers.

Thus, where(*h*) the defendant accepted *generally* a bill of exchange directed to him by the name of "H. B., cashier of the York Buildings Company," he was held personally liable for the amount of the bill to an indorsee, although he proved that the letter of advice was addressed to the company, and that the bill being brought to their house he was ordered to accept it, which he did in the same manner that he had accepted other bills. For the bill, on the face of it, imported to be drawn on the defendant, and it was accepted by him generally, and not as servant to the company, to whose account he had no right to charge it till actual payment by himself.

(*e*) Smout v. Ilberry, 10 M. & W. 1.

(*f*) Blades v. Free, 9 B. & C. 167.

(*g*) Higgins v. Senior, 8 M. & W. 834. See 2 Smith's L. C. 225; and see ibid. that the master himself may be liable if he were the real principal. But if the written contract describe the person, who is really only an agent, as principal, the real principal can neither sue nor be sued upon the contract; Humble v. Hunter, 12 Q. B. 310.

(*h*) Thomas v. Bishop, 2 Str. 955. See Healey v. Story, 3 Exc. 3. Mr. Justice Story in his work on Agency, sect. 159, note (3), and sect. 269, note (1), seems to doubt the authority of Thomas v. Bishop, in the latter note, and quotes an American case to shew that such notes as that in Thomas v. Bishop, are, in America, regarded as drawn upon the drawee in his *official* capacity. But in the case he quotes, the acceptance was "as agent." And it would seem that the mode in which the bill in Thomas v. Bishop was addressed to the defendant, left it ambiguous whether the words "Cashier," &c., were mere words of description or not, and the defendant, by accepting the bill *generally*, shewed that *he* considered the bill to be *addressed* to him personally, and not in his official character. See the observations of Patteson, J., in Davis v. Clarke, 6 Q. B. 16.

*So where(*i*) a broker, who was employed to sell goods, drew a bill for the price on the purchaser, he (the broker) was held [*197] liable upon the bill, although it was contended that he merely drew as the servant of the seller; for, having put his name on the bill, all the legal consequences of the act attached to him as much as to any other person whose name was thereon.

And in such cases it makes no difference, that a party taking the bill does so with full knowledge that a person whose name is on the bill, is a mere servant. Thus, the agent to a country bank, to whom the plaintiff sent a sum of money, in order to procure a bill upon London, and who thereupon, drew a bill in his own name for the amount upon the firm in London, the two firms being the same, was held personally liable as drawer of the bill, although the plaintiff *knew* that he was agent, and supposed that the bill was drawn by him as such, and on account of the country bank, to which the agent paid over the money.(*k*) And Lord Ellenborough said, "Is it not an universal rule, that a man who puts his name to a bill of exchange, thereby makes himself personally liable, unless he states, upon the face of the bill, that he subscribes it *for* another, or by procuration of another, which are words of exclusion? Unless he says plainly 'I am the mere scribe,' he becomes liable. Now, in the present case, although the plaintiff knew the defendant to be agent to the Durham Bank, he might not know but that he meant to offer his own responsibility. Every person, it is to be presumed, who takes a bill of the drawer, expects that his responsibility is to be pledged to its being accepted. Giving full effect to the circumstance that the plaintiff knew the defendant to be agent, still the defendant is liable, like any other drawer who puts his name to a bill without denoting that he does it in the character of procurator. The defendant has not done so, and, therefore, has made himself liable."

The rule illustrated by these cases is an inflexible one, and is by no means confined to bills of exchange, but applies to other written contracts,(*l*) and is founded *upon the principle before adverted to, that parol evidence is not admissible to contradict or vary any [*198] contract which has been reduced to writing.(*m*)

Where written contracts are entered into by clerks or other agents, a difficulty frequently arises, from the mode in which they are worded, as to the meaning of the parties, whether they intended to contract for themselves or not. In such cases, the general rule applies, that the construction of written documents is for the court. And it may be said, that, generally speaking, the onus of proving that a person who has signed a written document, merely acted as agent for some one else in so doing, lies upon the agent who would exempt himself from responsibility.(*n*)

Where the defendant covenanted "for himself, his heirs, executors,

(*i*) Lefevre v. Lloyd, 5 Taunt. 749; and see Sowerby v. Butcher, 2 C. & M. 371.

(*k*) Leadbitter v. Farrow, 5 M. & S. 345; and see per Gibbs, C. J., in Goupy v. Harden, 7 Taunt. 162.

(*l*) Jones v. Littledale, 6 A. & E. 486; Magee v. Atkinson, 2 M. & W. 440. See per Parke, B., in Higgins v. Senior, 8 M. & W. 845.

(*m*) Ante, p. 27.

(*n*) Smith's Mer. Law, 152.

&c., on the part and behalf of" A. B., that A. B. would pay a sum of money, the defendant was held personally liable.(*o*)

So where the solicitors of the assignees of a bankrupt, upon whose lands a distress had been put by the landlord, gave a written undertaking, thus, "We as solicitors to the assignees undertake to pay," &c., they were held personally liable.(*p*)

But where A., an auctioneer, entered into and signed an agreement as agent of B. and B., shortly afterwards signed it with the words "I hereby sanction this agreement, and approve of A.'s having signed it on my behalf:" it was held, that A. was not personally responsible.(*q*)

And so where A. (an agent) made a promise in the following terms, "I undertake (on behalf of Messrs. E. & Co.) to pay," &c.: it was held to be (upon the face of it) an undertaking as agent, and not to be binding upon A. personally, as there appeared to be no want of authority on his part to make such an undertaking, and no excess of authority in making it.(*r*)

[*199] *And where the plaintiff and several others, being performers in the orchestra at the Opera, Covent Garden, had a claim against the defendant for thirteen nights' salary, and negotiation took place in the green room of the theatre, the plaintiff acting on behalf of himself and the other performers, and the plaintiff signed the following document,—"The gentlemen of the orchestra, &c. are willing, and hereby pledge themselves, to continue their services and attend their duties, provided B. will guaranty the payment of the thirteen nights due on the 5th ult. Signed on behalf of the gentlemen of the orchestra, C. Lucas:"—it was held to be a joint contract, and that the plaintiff could not sue alone for a breach of it.(*s*)

It appears, however, not to be settled whether a clerk or servant, who draws bills or makes notes in his master's name without his authority, can be made liable in an action *upon the instrument* itself, though there appears to be no good reason why he should not.(*t*) In a case in which the question arose upon a bill of exchange, the Court of Exchequer did not at once repudiate the possibility that a clerk might be so liable, though it became unnecessary to decide the point, as it was not clearly proved that he had *not* authority to use his master's name.(*u*) But it is

(*o*) Appleton v. Binks, 5 East, 148. See Downman v. Williams, 7 Q. B. 111; Norton v. Herron, 1 C. & P. 648.

(*p*) Burrell v. Jones, 3 B. & Ald. 47; and see Iveson v. Conington, 1 B. & C. 160; Hall v. Ashurst, 1 C. & M. 714.

(*q*) Spittle v. Lavender, 2 Brod. & B. 452. See Bowen v. Morris, 2 Taunt. 374.

(*r*) Downman v. Williams, 7 Q. B. 103. See the American cases cited in Story on Ag. sect. 154. Lewis v. Nicholson, Q. B. East. Term, 1852, where it was held, that solicitors who entered into a contract 'on behalf of the assignees' of a bankrupt were clearly not personally liable *upon the contract.*

(*s*) Lucas v. Beale, 20 L. J., N. S., C. P. 134.

(*t*) See what is said by Lord Denman, C. J., in Trueman v. Loder, 11 A. & E. 594; and see the cases in Smith's L. C. 223 a. In America it would seem that he may be sued *upon the* note; Story on Ag. 264, note. As to his liability in such case to an action on the case for false representation, see ibid.; Pollhill v. Walter, 3 B. & Ald. 114.

(*u*) Wilson v. Barthorp, 2 M. & W. 863. See Jenkins v. Hutchinson 18 L. J., N. S., Q. B. 274.

clear that a clerk cannot render himself personally liable as *acceptor* of a bill of exchange directed to his master, since no one can be liable *as acceptor* but the person upon whom the bill is drawn, unless he be acceptor for honour.(*v*) And in a recent case,(*w*) in which the defendant, having no authority to do so, signed a *charter party* thus, "R. H. for T. A. B." (the owner of the ship): the Court of Queen's Bench held, that the defendant could not be sued *upon the charter party;* and Lord Denman said, "In the absence of any direct authority, we think that a party who *executes an instrument in the name of another, whose name he puts to the instrument and *adds his own name* only as agent for that other, cannot be treated as a party to that instrument and be sued upon it, unless it be shewn that he was the real principal." [*200]

A question, however, more frequently arises as to the personal responsibility of a clerk or other servant, or agent, to persons other than his master or principal, for money which has been paid to him on account of his master. And the question is one of much importance and some difficulty. The general rule applicable to cases of this sort undoubtedly is respondeat superior. Payment to a clerk or servant *authorized* to receive the money(*x*) is payment to the master, who receives by the hand of his clerk. Generally speaking, therefore, when money is *rightfully* obtained by or paid to a clerk or other servant authorized to receive it on account of his master, any action to recover it back should be brought against the master.(*y*) And this rule is but just; for since, in general, an agent cannot dispute the title of his principal, and it is only in very special cases(*z*) that he can set up jus tertii against his principal, a servant who had received money on account of his master could not dispute his master's right to it; and to hold him responsible to third persons, would be to subject him to two actions for the same cause.

Upon this principle depends the case of Sadler v. Evans.(*a*) In that case, it appeared that the defendant, as receiver to Lady W., received quit rent due to her from the plaintiff, and gave a receipt for it as such. The plaintiff contending that Lady W. was not entitled to the quit rent, brought an action for money had and received against the receiver, but was nonsuited, on the ground that the payment to the receiver was payment to Lady W., and the action ought to have been brought against her. And the court, in discharging a rule which had been obtained to set aside the nonsuit, observed, that in cases of payment to a known agent the *action ought to be brought against the principal, unless in special cases (as under notice, or mala fide.) [*201]

The principle upon which Sadler v. Evans was decided may be not inaptly illustrated by a case the exact converse of it. The defendant's agent, R., had contracted to sell an estate belonging to the defendant to the plaintiff, and had received a deposit from him; but the conditions of

(*v*) Davis v. Clarke, 6 Q. B. 16.
(*w*) Jenkins v. Hutchinson, 18 L. J., N. S., Q. B, 274; S. C. 13 Q. B. 744.
(*x*) Otherwise he is a mere stranger.
(*y*) Selw. N. P. 102, 11th ed.; Smith's Mer. Law, 153; Paley on Ag. 388.
(*z*) Such, for instance, as where his master has been guilty of fraud. See Hardman v. Wilcock, 9 Bing. 382, note; Cheeseman v. Exall, 6 Exc. 341.
(*a*) 4 Burr. 1985. See Greenway v. Hurd, 4 T. R. 555.

sale not being complied with, the plaintiff brought an action against *the defendant* to recover his deposit. On the part of the defendant it was objected, that no proof was given that the deposit had been paid over to him, and, in fact, it had not been paid to him. But Lord Ellenborough said, it made no difference whether it was actually paid over or not, R. acted completely as the agent of the defendant. Therefore, when the deposit was lodged with the agent, this was, in law, eo instanti a payment to the principal.(*b*)

And the following cases, where the action was against the clerk, servant, or agent, were decided upon similar principles. Thus, where the defendant, a banker's clerk, signed a receipt for money paid into the bank by the plaintiff, "for Spooner and Attwood—Wm. Read:" he was held not liable to an action for money had and received at the suit of the plaintiff, but the action should have been brought against Spooner and Attwood, the receipt being evidence that they, and not the defendant, had received the money.(*c*)

And so an attorney's clerk, who, in his master's absence, received some money which was paid to him at his master's office by a debtor to a client of his master, and signed a receipt thus, "for Mr. S. John—John Badcock," was held not responsible to the client for the money, although he had not paid it over to his master, as he was accountable to his master for it; and the client must look to him for redress. And Lord Tenterden said, "It is perfectly clear that the defendant received the money as the agent or servant of John, and must have paid it over to him if he had returned. The receipt given is the receipt of John, and (if he had not been bankrupt) would have been evidence against him in an action brought by the present plaintiff."(*d*)

[*202] *Upon similar principles it has been held,(*e*) that attorneys, who, upon an agreement for the sale of an estate belonging to one Stott, had, as his agents, received from the plaintiff a deposit, were not liable to an action at the suit of the plaintiff for a return of the deposit, on the sale going off for want of title in Stott, as they received the money as *his* agents, and to account to him. And Coleridge, J. said, that payment over of the deposit was immaterial; the moment the money was in the defendant's hands, it was in Stott's hands.

And so it has been held,(*f*) that an action for money had and received would not lie against a revenue officer for an overpayment: though in a subsequent case,(*g*) where the duty paid remained in the hands of the collector, not paid over, with the consent of the attorney-general, for the express purpose of trying the validity of imposing the duty, the court did not raise any objection to an action for money had and received against the collector. But in a more recent case,(*h*) it was held, that the action would not lie against the Receiver General of Excise to recover duties

(*b*) The Duke of Norfolk v. Wortley, 1 Camp. 337.
(*c*) Edden v. Read, 3 Campb. 338. (*d*) Stephens v. Badcock, 3 B. & Ad. 354.
(*e*) Bamford v. Shuttleworth, 11 A. & E. 926; and see Hurley v. Baker, 16 M. & W. 26.
(*f*) Whitbread v. Brooksbank, Cowp. 69; and see Greenway v. Hurd, 4 T. R. 555, where it appeared that the money had been paid over before action brought.
(*g*) Campbell v. Hall, Cowp. 205. (*h*) Atlee v. Backhouse, 3 M. & W. 633.

said to have been overpaid to him, inasmuch as the money was paid to him for the purpose of being paid over pursuant to act of parliament, and it was not shown that it remained in his hands till he had notice to retain it. And the court said that, unless the contrary were proved, they would presume the money had been applied by a public officer, as it was his duty to apply it.

The rule exempting a clerk or other servant from responsibility to third persons for money *rightfully* received on account of his master, applies a fortiori where the money has been *paid over* by such clerk to his master.(*i*) In that case, even though the money was originally paid by mistake, the clerk, paying it over to his master, does no wrong. It was paid to him for the purpose of being paid over, and he has effected that purpose, and cannot again be called upon to account for *the money, even though his master has no right to retain it. In an old case,(*k*) therefore, where the defendant, who was a clerk [*203] of the South Sea Company, received from the plaintiff 600*l.*, on account of the third subscription, and, by mistake, never entered it in the book, but paid it over to the company; Pratt, C. J., ruled, that no action would lie against him at the suit of the plaintiff. And in a subsequent case,(*l*) Lord Mansfield said, "In general the principle of law is clear, that if money be mispaid to an agent expressly for the use of his principal, and the agent has paid it over, he is not liable in an action by the person who mispaid it, because it is just that one man should not be a looser by the mistake of another, and the person who made the mistake is not without redress, but has his remedy over against the principal." Upon this principle it was held, that(*m*) an action for money had and received would not lie against a churchwarden to recover back dues which had been paid to him, but which he had paid over to the treasurer of the trustees of the chapel. And similar principles have been acted on in several subsequent cases, some of which are referred to in the note.(*n*) The mere passing money in account by an agent, without any fresh credit given to, or bills accepted on account of, his principal, is not, however, equivalent to payment over.(*o*)

But the doctrine, that the receipt of a servant or agent is the receipt of his master or principal, does not apply to the case of a servant who is a wrong doer, so as to discharge him.(*p*) If, therefore, a servant,

(*i*) Paley on Ag. 390; Smith's Merc. Law, 153.

(*k*) Cary v. Webster, Str. 480. (*l*) Buller v. Harrison, Cowp. 565.

(*m*) Horsfall v. Handley, 8 Taunt. 136.

(*n*) See Greenway v. Hurd, 4 T. R. 553; Boles v. Wright, 4 Taunt. 198; Tope v. Hockin, 7 B. & C. 110; Vern. 136, 208; and see Atlee v. Backhouse, 3 M. & W. 633; White v. Bartlett, 9 Bing. 378; Ireland v. Thompson, 4 C. B. 171.

(*o*) Buller v. Harrison, Cowp. 565; and see McCarthy v. Colvin, 9 A. & E. 607.

(*p*) Nor can payment by the servant be considered payment by the master so as to expose him to the application of the maxim afterwards mentioned in the text,—"in pari delicto potior est conditio defendentis;" and, therefore, where the plaintiff's clerk received money from his customers, and paid it to the defendants, upon the chances of the coming up of tickets in the State Lottery of 1772, contrary to the Lottery Act of that year: it was held by Lord Mansfield, that the plaintiff might recover the money from the defendants; Clarke v. Shee, Cowp. 197; and see Corking v. Jarrard, 1 Campb. 37, as quoted by Park, J., in Abbotts v. Barry, 2 Brod. & B. 371.

[*204] acting *illegally or wrongfully, gets money into his hands, he cannot defend himself from an action at the suit of the party legally or rightfully entitled to it, on the ground that he acted merely as the agent of his master, and has paid over the money to him.(q) No one but the person legally entitled to the money can give a discharge for it; and until it is paid to him, the servant or agent is liable to be sued by him for it, provided he is not prevented from suing by the rule—in pari delicto potior est conditio defendentis."(r)

This was decided in Miller v. Aris,(s) which was an action brought by the plaintiff, who had been a prisoner in the Coldbath Field's Prison, against the governor of the prison, to recover a sum of money paid by the plaintiff for lodging while he was confined as a prisoner in that prison, and which sum exceeded the amount allowed by the prison regulations. On behalf of the defendant it was contended, that he was not liable, as he had accounted at the sessions to the county for all the sums received on account of the gaol: but he was, nevertheless, held liable; Lord Kenyon saying, that Sadler v. Evans,(t) and such cases, did not apply where there is corruption in the foundation of the contract, or it is bottomed in oppression or immorality.

And so a sheriff's officer was held liable to refund to the plaintiff a [*205] sum of money which he had illegally *extorted from him, under colour of a warrant from the sheriff; and it was held to be no defence, that the defendant had paid the money over to the sheriff, as the defendant had acted illegally in receiving the money, which could not therefore have been paid to him for the purpose of being paid over to the sheriff.(u)

Neither does the doctrine above mentioned apply to cases in which a servant or agent gets money into his hands *by means of a trespass or other tort* committed by the orders of, or in company with, his master or principal. For all persons concerned in a tort are principals, and as the party injured might bring his action against the servant for the damages sustained in consequence of his wrongful act, he is allowed to waive his right to proceed in that form of action, and sue for the money received by the wrongdoer.

Upon this ground, where(v) the defendant, by direction of his father, who claimed to be executor of the plaintiff's wife deceased, went to her

(q) This is strongly illustrated by Sharland v. Mildon; Same v. Loosemore, 5 Hare, 469, where it was held by Wigram, V. C., that the agent of an executor de son tort collecting the assets, knowing them to belong to the testator's estate, and that his principal was not the legal personal representative, made himself personally liable as executor de son tort, notwithstanding he had duly accounted for his receipts to his principal; but see Pond v. Underwood, 2 Ld. Raym. 1210; 1 Wms. Exors. 461.

(r) As the plaintiff was in Goodall v. Lowndes, 6 Q. B. 464; and see Smith v. Bromley, 2 Dougl. 695; Williams v. Hedley, 8 East, 378; Higgins v. Pitt, 4 Exc. 324.

(s) 3 Esp. 232; Selw. N. P. 103. (t) 4 Burr. 1985, ante, p. 200.

(u) Snowdon v. Davis, 1 Taunt. 359. See Smith v. Sleap, 12 M. & W. 585; Valpy v. Manley, 1 C. B. 594; Wakefield v. Newbon, 6 Q. B. 276; Davies v. Vernon, 6 Q. B. 443; Oates v. Hudson, 6 Exc. 346. See also Townson v. Wilson, 1 Campb. 396; Chappell v. Poles, 2 M. & W. 867; Parker v. Bristol and Exeter Railway Co., 6 Exc. 705, 706.

(v) Tugman v. Hopkins, 4 M. & G. 389; and see Sharland v. Mildon, 5 Hare, 469; Edwards v. Hodding, 5 Taunt. 815; Neate v. Harding, 6 Exc. 349.

lodgings and took a large sum of money from a bureau which he said belonged to his father as executor, and which he paid over to him accordingly: the defendant was held liable to an action for the money at the suit of the plaintiff, although it was contended that he merely acted as agent to his father, against whom the action should have been brought. And Tindal, C. J., said, "The defendant was a wrongdoer in taking the money, and would have been liable to the plaintiff in trespass. The plaintiff, however, waives the tort, and sues the defendant for money had and received; and the defendant cannot relieve himself from liability by paying over the money to another party as he might have done if the original taking had been lawful. This circumstance distinguishes the present case from Stephens v. Badcock:(*w*) for there the defendant received the money as agent for a party who was entitled to receive it, whereas here the receipt was *altogether wrongful, and it must be taken with all its consequences." [*206]

But a clerk or other servant or agent who has received money on account of his master, and *has not paid it* over to him, before receiving notice not to do so from or on behalf of the person who paid it, may be liable to refund the money, and cannot shelter himself from such liability under the maxim respondeat superior, if the circumstances of the case are such that, had the money been paid over to the master, he would have had no defence to an action to recover it: as in such case the servant, if obliged to pay the money over to the person entitled to it, would have a good defence to any action brought against him by his master, and would not be estopped from disputing his title to the money.

Thus, in Cary v. Webster,(*x*) it was said by Pratt, C. J., that if the defendant had not paid the money over, the plaintiff would have had his option either to charge him or the company; as in the common case of payment to a goldsmith's servant, who does not carry it to the account of his master, the party has an election to go against either; he may charge the servant, because till the money is paid over, the servant receives it to his use; or he may pass by the servant and make his demand upon the master, because the payment to the servant is made in confidence of the credit given him by the master.

So, in an action(*y*) brought by the plaintiff, an underwriter, to recover back from the defendant, who was agent for the insured, Messrs. L. and S., resident at New York, a sum paid by the plaintiff upon a loss, supposed to be fair, but which turned out to be foul; the defendant had passed the whole sum in his account with Messrs. L. and S., and given credit to them for it against a sum in which they stood indebted to him, but had accepted no fresh bills, nor given any credit to his principals, and had not paid the money over to them; it was held, that the mere placing the money to the credit of the principals was not equivalent to paying it over; and that the defendant was liable to refund the money to the plaintiffs. In delivering judgment, Lord Mansfield said, "In general the principle of law is clear, that if money be mispaid to an agent ex-

(*w*) 3 B. & Ad. 354. See this case, ante, p. 201. (*x*) Str. 480, ante, p. 203.
(*y*) Buller v. Harrison, Cowp. 565.

pressly for the use of his principal, and the agent has paid it over, he is not [*207] *liable in an action by the person who mispaid it, because it is just that one man should not be a loser by the mistake of another, and the person who made the mistake is not without redress, but has his remedy over against the principal. On the other hand it is just, that as the agent ought not to lose, he should not be a gainer by the mistake. And, therefore, if after the payment so made to him, and before he has paid the money over to the principal, *the person corrects the mistake*, the agent cannot afterwards pay it over to his principal without making himself liable to the real owner for the amount. But the present case turns upon this, that the agent was precisely in the same situation at the time the mistake was discovered as before."

So, where(*z*) it appeared that the defendant had received a bar of silver from his correspondent at Gibraltar, and sold it to the plaintiff at a price calculated with reference to the number of ounces which, on assay, it was supposed to contain; and it turned out afterwards that it contained fewer ounces than had been supposed; the plaintiff was held entitled to recover from the defendant the money overpaid to him, as he had not *paid it over* to his principal, although he had forwarded an account to him, in which he had credited him with the full sum, but which was still unsettled. And Lord Ellenborough, C. J., said, "I take it to be clear that an agent, who receives money for his principal, is liable as a principal as long as he stands in his original situation; and until there has been a change of circumstances, by his having paid over the money to his principal, or done something equivalent to it. Here it is admitted that no money has been paid over by the defendant to his principal, nor has there been any other thing done by him to create a change of circumstances. The only question then is, whether the action lies against the defendant, considering it as if it were an action against the principal."

So in the following case,(*a*) a principal was held not entitled to set off, [*208] against a debt due from him to his *agent, a sum of money received by the agent on account of his principal, but returned by him to the person who paid it before action brought, under circumstances which were held to justify the agent in returning the money. It was an action by a livery stable keeper for the keep of his horse belonging to the defendant, to which the defendant pleaded a set-off for money received by the plaintiff for the use of the defendant. The horse had stood sometime in the plaintiff's stables, when at length the plaintiff sold it, with a warranty, for 125*l.*, which sum the defendant claimed to set off against the plaintiff's demand. But it appeared that the horse, not answering the warranty, had been returned by the purchaser, to whom the plaintiff had returned his money, before the action was brought; and it was held, that the plaintiff was justified in return-

(*z*) Cox v. Prentice, 3 M. & S. 344. It may be observed of both Buller v. Harrison and Cox v. Prentice, that the principal was a *foreigner*. As to which see Story on Ag. sect. 268; Paley on Ag. 248; Thompson v. Davenport, 9 B. & C. 78. See however, Paley on Ag. 388, 389; Story on Ag. sect. 300, and Smith's Merc. Law, 153.

(*a*) Murray v. Mann, 2 Exc. 538.

ing the money, which could not, therefore, be set off against his claim for the keep of the horse. On behalf of the defendant it was contended, that the plaintiff, an agent, could not set up his own fraud, in giving a false warranty, by which he was obliged to return the money, against his principal, the defendant: but "the answer is," said Parke B., "that the principal never had a right to the 125*l.*, except by the act of his agent in making a contract, which was defeasible by reason of fraud. It is true that fraud does not make the contract actually void, but only voidable at the election of the party; but the moment the purchaser chose to declare it void, *the price was recoverable back from the plaintiff*, and it ceased to be money in his hands received for the use of the defendant. I am, therefore, clearly of opinion, that the set-off was defeated by the proof of fraud. The plaintiff does not, in truth, set up his own fraud against the defendant, but says, "I only received that money subject to a defeasance, which has taken effect.

A servant may also, in some cases, be liable to an action at the suit of a third person for nonpayment of money which he has received from his master with orders to pay it to such third person. But in order to render him liable to such an action, it is not sufficient that he should have received the money from his master with orders to pay it to a particular person; he must have done some act amounting to a specific *appropriation* of the money to the use of that person; he must have assented to hold it to his use, otherwise there is no privity between them: and the servant is only responsible *to his master,(*b*) and such assent must, of course, be before action brought. [*209]

This position is well illustrated by the case of Howell v. Batt.(*c*) That was an action for money had and received. The plaintiff was a joint proprietor of a coach running from Exeter to London, and the defendant was office keeper and servant to C., the proprietor at Exeter. The defendant used, in his capacity of office keeper, at stated intervals to make up the share bills of the coach, and take sums of money from a balance of C.'s, which he had in hand, and send them to the proprietor's as their shares of the profits. On one occasion 23*l.* were due to the plaintiff, and the defendant made up a packet purporting to contain that sum and sent it to the plaintiff. The packet only contained 20*l.*, and the action was brought for the difference. No sum of money was expressly given to the defendant by C. for the plaintiff, but after the action was brought the defendant admitted that he had had the money of C., but said he had sent it to the plaintiff. The plaintiff was nonsuited, on the ground that there was no privity between him and the defendant; and a rule to set aside the nonsuit was afterwards refused,—Parke, J., observing, "If it had been proved that the defendant had, as it were,

(*b*) Paley on Ag. 394. See Williams v. Everett, 14 East, 582; Lilly v. Hays, 5 A. & E. 548, and other cases cited; 1 Wms. Saund. 210 b, note; and see Gidley v. Lord Palmerston, 3 Brod. & B. 275, where the Secretary at War was held not liable to an action at the suit of a retired clerk of the War Office for his retired allowance, although the Secretary at War had received the money applicable to such allowance.

(*c*) 5 B. & Ad. 504. See Baron v. Husband, 4 B. & Ad. 611.

attorned to the plaintiff and agreed to hold the money for his use, and not subject to the direction of C., the case would have been different."

IN CASES OF TORT—CRIMINALITER.

We have seen, in the preceding Chapter, that a master is in many cases liable to answer criminally for the acts of his servants. Such liability on the part of the master does not, however, by any means, always involve the exemption of the servant from a similar liability to [*210] *answer *criminaliter* for his own acts, although performed by him in the discharge, or supposed discharge, of his duty to his master, or in obedience to his master's commands.(1) In criminal matters it is a general rule, that every person must answer for his own acts, and the command of no person can excuse an illegal act. A servant, therefore, is not, generally speaking, excused from liability to answer criminally for any violation of the law which he may commit, on the ground that he was only acting in obedience to his master's commands.(*d*) This is so obviously the case in regard to offences which are mala in se, that no more need be said upon the subject. But where the illegal act charged is merely malum prohibitum, the fact that the servant was acting in obedience to his master's commands would be strong evidence to rebut that prima facie inference of the existence of a vicious mind which generally arises from the mere doing an illegal act; and in such cases it may sometimes happen that, in *this way*, the command of the master may, in effect, exempt the servant from criminal responsibility for the consequences of illegal acts done in obedience to his master's orders.

Thus in the case of Rex v. James.(*e*) That was an indictment on the stat. 7 & 8 Geo. 4, c. 30, s. 6, for maliciously obstructing an airway belonging to a mine, with intent to hinder and delay the working of the mine. The defendants had acted under the orders of P., the lessee of an adjacent mine, and upon its being suggested by the counsel for the prosecution, that although the defendants were acting under P.'s orders, still that an order to do wrong afforded no justification; Lord Abinger, C. B. inquired, "If a servant did this by his master's order, and supposing bona fide that the master had a right to order it to be done, would it not be too much to say that the servant is answerable as a felon for doing the thing maliciously, when the malice, if there is any, is his master's and not his own?" Upon which, the counsel for the prosecution said, "Suppose a master ordered his servant to shoot a man, that would be *no excuse for the servant if he did it." "But," said Lord [*211] Abinger, "That is an act which is malum in se. But if a master having a doubt or no doubt of his own rights, sets his servants to build a wall in a mine, they would if he proved to have no right, be all

(*d*) 1 Hawk. P. C. 3; 4 Bl. Comm. 28.

(*e*) 8 C. & P. 131; and see Reg v. Bleadsdale, 2 Carr. & K. 768, where Earle, J. said "If a man does by means of an innocent agent an act which amounts to a felony, the employer and *not the innocent agent*, is the person accountable for that act.

(1) See Wilkens v. Gilmor, 2 Humph. R. 140.

liable in an action of trespass, but it would not be felony in the servants. The rules respecting acts mala in se do not apply. If a master told his servant to shoot a man, he would know that that was an order he ought to disobey. But if the servant bona fide did *these* acts, I think they do not amount to an offence within the statute. If a man claims a right which he knows not to exist, and he tells his servants to exercise it, and they do so, acting bona fide, I am of opinion that that is not felony in them, even, if in so doing, they obstruct the airway of a mine. What I feel is this, that if these men acted bona fide in obedience to the orders of a superior, conceiving that he had the right which he claimed, they are not within this act of parliament. But if either of these men *knew* that it was a malicious act on the part of his master, I think then that he would be guilty of the offence charged." The prisoners were acquitted.

There are also many cases which may properly be mentioned in this place, but to which it is unnecessary to advert at any length, as they scarcely come within the scope of the present work, in which servants may be liable to indictment for culpable neglect of the duty undertaken by them towards their employer, where that duty also involved a duty to the public; such, for instance, as the driver of a carriage, or the captain of a vessel, who, by negligent driving or navigation, causes the death of any person. In such cases, though the master may be liable in a civil action for the consequences of his servant's negligence; yet the servant must answer *criminally* for his own personal negligence.(*f*) It may, indeed, well be doubted, if a mere act of *omission* to perform his duty will, in any case, render a man criminally responsible, except where that duty is imposed upon him by law, as, *e. g.* the duty of a parent towards his child. In a recent case, however, in which *the ground bailiff of a mine, whose duty it was to cause proper air-headings [*212] to be put up to prevent the accumulation of noxious gases, neglected to do so, and an explosion of firedamp took place, which killed a person, for whose manslaughter he was indicted: Maule J., in summing up, told the jury, that if they were satisfied that it was the ordinary and plain duty of the prisoner to have caused an air-heading to be made, and that a man, using reasonable diligence, would have had it done, and that by the omission the death of the deceased occurred, they ought to find the prisoner guilty of manslaughter.(*g*) But it has been held, that an engineer, under similar circumstances, could not be convicted of manslaughter upon an indictment which did not allege a duty in him which he had neglected to perform.(*h*)

A distinction of considerable importance must also here be adverted to, which obtains between civil and criminal proceedings, for the consequences of negligence. In civil proceedings as we have seen, no person can recover damages against a master for the negligence of his servant, if

(*f*) See Rex v. Allen, 7 C. & P. 153; Rex v. Green, ibid., 156, where the captains of steamers were indicted for the manslaughter of persons killed by being run down by the steamers; but were acquitted, as there was no proof of any personal act; and see Reg. v. Taylor, 9 C. & P. 672.

(*g*) Reg. v. Haines, 2 Carr. & K. 368. The prisoner was acquitted.

(*h*) Reg. v. Barrett, 2 Carr. & K. 343. See the form of the indictment in the note to Reg. v. Haines, ubi supra.

he has, by his own negligence, contributed to, or caused the injury complained of. But, in criminal proceedings, the converse of that proposition is true, and it is no answer to a criminal charge, as of manslaughter, that the deceased, by his own negligence or improper conduct, or by being deaf, or drunk, contributed to his own death.(*i*) So highly does the law value human life, that every person who has contributed to destroy it, is responsible; and it does not diminish that responsibility that others also have been guilty of negligence.(*k*)

IN CASES OF TORT—CIVILITER.

It is a general rule in cases of tort, that all persons concerned in the wrong are liable to be charged as principals. It was said in Sands v. Child,(*l*) that the *warrant of no man, not even of the King himself, can excuse the doing of an illegal act; for although the commanders are trespassers, so are also the persons who did the fact." A servant, therefore, can in no case excuse himself from liability to an action founded upon a misfeasance or positive wrong done to another person, upon the ground that he acted merely in obedience to his master's orders, or for his master's benefit.(*m*)(1) But for mere nonfeasance or omission of duty, a servant is not liable to answer in a civil action at the suit of third persons, but only to his own master,(*n*) who, in accordance with the maxim already alluded to, "Respondeat superior," is liable to answer for his servant's neglect.(*o*) *This distinction between misfeasance and nonfeasance was thus stated by Lord Holt in his celebrated

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(*i*) Reg. v. Swindall, 2 Carr. & K. 230.

(*k*) Ibid; and see Reg. v. Haines, 2 Carr. & K. 368.

(*l*) 3 Lev. 352; but see Buron v. Denman, 2 Exc. 167, where the captain of a man-of-war, having committed an act of trespass, which was afterwards adopted and ratified by the Crown, was held not liable to be sued by the party injured, who had his remedy against the Crown only (such as it was.)

(*m*) In Pearson v. Graham, 6 A. & E. 902, Lord Denman, C. J., said, "it might be very doubtful whether a servant delivering goods by his master's order could be said to have converted those goods as against the assignees of his master. Coles v. Wright, 4 Taunt. 198, rather seems to shew that he could not." The case of Coles v. Wright, however, seems to belong to a different class of cases, ante, p. 202. It was an action for money had and received, and the defendant was held not liable, as he had paid the money over to his master. And in Pearson v. Graham, the defendant, who had received no express orders as to the goods in question, but took upon himself, under a general authority, to sell and deliver them at a time when, as it afterwards turned out, his master had committed an act of bankruptcy, was held liable to an action of trover at the suit of his master's assignees. Any distinction between the effect of a special and a general authority from the master to the servant, upon the liability of the servant, would seem to be opposed to the cases of Perkins v. Smith, and Stephens v. Elwall, afterwards cited in the text; and which cases were not cited in Pearson v. Graham.

(*n*) Gidley v. Lord Palmerston, 3 Brod. & B. 275, 285.

(*o*) So the servant of a carrier is not generally responsible for the loss of a parcel, to the owner, who should look to the master; Williams v. Cranstoun, 2 Stark. 82; Cavanagh v. Such, 1 Price, 328, as the duty (the breach of which gives the right of acting) arises out of a contract with the master. See Marshall v. The York, Newcastle and Berwick Railway Company, 21 L. J., N. S., C. P. 34, where it was held, that a servant might maintain an action against carriers for loss of his luggage, although his master paid the fare.

(1) See Hall v. Caserly, 7 N. Hamp. R. 215.

judgment in Lane v. Cotton.(p) "It was objected at the Bar that they have this remedy against Breese (the servant.) I agree, if they could prove that he took out the bills, they might sue him for it: so they might anybody else on whom they could fix that fact; but for a neglect in him, they can have no remedy against him, for they must consider him only as a servant, and then his neglect is only chargeable on his master or principal; for a servant or deputy, quatenus such, cannot be charged for neglect, but the principal only shall be charged for it; but, for a misfeasance, an action will lie against a servant or deputy, but not quatenus a deputy or servant, but as a wrongdoer."

Upon the principle that a servant is liable for a misfeasance, the defendant was held liable in Perkins v. Smith,(q) which may be regarded as a leading case upon the subject. In that case the facts were shortly these. The plaintiff was assignee of a bankrupt, and the defendant servant and riding clerk to a creditor of the bankrupt; the defendant went to the bankrupt's shop to try and get his master's money, and found it shut up, but the bankrupt delivered to the defendant certain goods, for which the defendant gave a receipt in his master's name, and then sold the goods for his master's use, upon which the bankrupt's assignee brought an action of trover against the servant. It was objected, that the action was improperly brought against the servant, who acted wholly in this matter for his master, and that the conversion, which is the gist of the action of trover, was found to be to the use of the master. But after two arguments at the Bar the court gave judgment for the plaintiff; Lee, C. J., saying, "The point is, whether the defendant is not a tortfeasor; for if he is so, no authority that he can derive from his master can excuse him from being liable in this action. . . . The act of selling the goods is the conversion, and whether to the use or himself or another, it makes *no difference. I am very well satisfied that this servant has done wrong, and [*215] that no authority that could be derived from his master, before or after the fact, can excuse him."

The rule thus laid down was again acted on in Stephens v. Elwall,(r) which was also an action in trover by the assignees of a bankrupt for goods which the bankrupt had sold after his bankruptcy to D., to be paid for by bills on H., for whom the goods were bought. H. was in America, and the defendant was his clerk: the goods were delivered to the defendant, who sent them to H. in America. At the trial it was contended, on the authority of Perkins v. Smith, that the defendant was liable, although he merely acted as clerk to H.; the Judge, however, thought otherwise, and so directed the jury, who found a verdict for the defendant. But in the following Term a new trial was granted; Lord Ellenborough, C. J., saying, "The only question is, whether this is a conversion in the clerk, which undoubtedly was so in the master. The clerk acted under an unavoidable ignorance and for his master's benefit when he sent the goods to his master; but, nevertheless, his acts may amount to a conver-

(p) 12 Mod. 488.

(q) 1 Wils. 328; and see Michael v. Alestree, 2 Lev. 172, where the action (for negligent driving,) was brought against both master and servant.

(r) 4 M. & S. 259. See Greenway v. Fisher, 1 C. & P. 190.

sion, for a person is guilty of a conversion who intermeddles with my property and disposes of it; and it is no answer that he acted under authority from another, who had himself no authority to dispose of it. And the court is governed by the principle of law, and not by the hardship of any particular case; for what can be more hard than the common case in trespass, where a servant has done some act in assertion of his master's right, that he shall be liable, not only jointly with his master, but, if his master cannot satisfy it, for every penny of the whole damage; and his person also shall be liable for it, and, what is still more, that he shall *not recover contribution.*"(*s*)

Similar principles were again enforced in Cranch v. White.(*t*) That [*216] was an action of trover for a bill of *exchange which had been entrusted by the plaintiff to one Roberts to get discounted. Roberts owed the defendant's mother, who was a coal merchant and whose clerk the defendant was, a large sum for coals, and instead of getting the bill discounted, Roberts indorsed it and placed it in the hands of the defendant, who carried it to the credit of Roberts's account with his, the defendant's, mother. The defendant, when apprised of Roberts's fraud, refused to deliver up the bill; but it was held that, by so doing, he rendered himself liable to the action of trover which was brought against him; although it was contended on his behalf that the action should have been brought against his mother: Tindal, C. J., saying, that any justification of the defendant's conduct as the agent of his mother, fell to the ground, on the authority of Perkins v. Smith and Stevens v. Elwall.

And again in Powell v. Hoyland.(*u*) In that case the defendant, acting on behalf of Y. and Co., obtained from the plaintiff certain bills of exchange under circumstances which did not entitle Y. and Co. to them. These circumstances were unknown to the defendant at the time he obtained the bills from the plaintiff; but he was afterwards, and before he had delivered the bills to Y. and Co., informed of the facts and told that his employers had no right to the bills. In spite of this information he refused to give the bills to the plaintiff, and delivered them to his employers: and it was held that, by so doing, he became liable to an action of trover. Parke observing, "there is no doubt that though the defendant did not receive the bills for himself, but as the agent of Y. and Co., he may be liable in an action of trover, if the facts show a conversion by him;"—which they were held to do.

Where, however, a servant merely refuses to deliver goods received from his master to any other person without his master's orders, such refusal has been held not to amount to a conversion by the servant, and he has accordingly been held not liable to an action for trover.(1)

Upon this distinction depends the old case of Mires v. Solebay.(*v*) There the defendant, by command of his master, drove some sheep, which

(*s*) See, as to this point, Merryweather v. Nixan, 8 T. & R. 186; S. C. 2 Smith's L. C. 297, where the subsequent cases will be found collected. See also Farebrother v. Ansley, 1 Campb. 343; Adamson v. Jervis, 4 Bing. 66.

(*t*) 1 Bing. N. C. 414; and see Davies v. Vernon, 6 Q. B. 443.

(*u*) 6 Exc. 67. (*v*) Mod. 242.

(1) See Mount v. Derick, 5 Hill's Rep. 455.

the plaintiff claimed to have purchased, on to his master's land, and then refused to deliver them to the plaintiff, he was held not *liable in trover for so doing, "for it being in obedience to his master's [*217] command, though he had no title, yet he shall be excused."

So, where(*w*) the defendant, who was servant to an insurance company, had in his custody in a warehouse, of which he kept the key, certain goods belonging to plaintiff saved from a fire in the plaintiff's house, and which had been carried to the warehouse by the servants of the company, and upon the plaintiff demanding the goods, said he could not deliver them without an order from the company, he was held not liable to an action of trover, as the refusal to deliver the goods without an order from his master did not amount to a conversion of the goods.(1) "If," said Holroyd, J., "we were to hold this refusal to be a conversion, it would go this length, that if a person were to call at a gentleman's house, and to ask his servant to deliver goods to him, and the servant were to refuse to do so, unless a previous application was made to his master, it would amount to a conversion on the part of the servant. In this case the goods came into the defendant's possession lawfully, and the refusal is only till an order is obtained from the defendant's employers. In Perkins v. Smith, the defendant received the goods wrongfully at first, and the conversion was by an actual sale of them. Now, it is clear that the authority of the master would not amount to a defence of that which was altogether a tortious act of the servant. The case of Mires v. Solebay is an authority in point."

But a *warehouseman*(*x*), who refused to deliver goods out of his warehouse to the rightful owner without the direction of the person from whom he (the warehouseman) received them, was held liable to an action of trover at the suit of the rightful owner, as such refusal was considered to be sufficient evidence of conversion. In that case, however, the defendant was a warehouseman, and it was considered that the defendant had, by his conduct, *identified* himself with the person from whom he received the goods, whereas, in Alexander v. Southey, the defendant was merely a servant, and referred the parties to his master.(*y*)

Where a servant of the law refuses to give up goods which had been attached by legal process, saying that they *were in the custody of the law, his doing so was held not to amount to a conversion, [*218] so as to render him liable to an action at the suit of the owner of the goods.(*z*) There, however, the defendant remained *passive;* had he taken upon himself to decide, he might perhaps have rendered himself liable.(*a*)

We have already seen, that if a servant is guilty of a fraud in transacting his master's business, the master may be liable to an action at the suit of the party defrauded. And it would seem to be the better opinion that the servant also is liable, if he *knowingly* commit a fraud in his

(*w*) Alexander v. Southey, 5 B. & Ald. 247.
(*x*) Wilson v. Anderton, 1 B. & Ad. 450.
(*y*) See Catterall v. Kenyon, 3 Q. B. 310.
(*z*) Verrall v. Robinson, 2 Cr. M. & R. 495.
(*a*) Catterall v. Kenyon, 3 Q. B. 310.

(1) See same case cited on p. 216.

master's business, to answer for it to the party injured, and cannot shelter himself under his master's responsibility, although authorized by his master to commit the fraud; for, as observed by Mr. Justice Story,(*b*) it is an illegal act, and contrary to sound morals. It is, indeed, laid down in Rolle's Abridgment,(*c*) that if the servant of a tavern sell bad wine knowingly, no action lies against him, for he only did it as servant. But that position has been frequently doubted by text-writers,(*d*) and would seem to be contrary to the principles of the cases before referred to, in which the command of the master has been held no justification of a misfeasance on the part of a servant.

We have also, whilst treating of the liability of a master for the tortious acts of his servants, seen that an exception to his general liability in such cases is established in the case of public officers in a superior capacity, who are not in general responsible for the tortious acts of their subordinate officers. It by no means follows, however, that such subordinate officers are not themselves responsible for their own misdeeds. On the contrary, the exemption of their superior officers from liability to answer for their misfeasances would seem to offer an a fortiori reason for holding *them* responsible for their own acts, otherwise wrongs committed [*219] by them might go altogether unredressed, since, upon public *grounds government are not generally responsible for the misfeasances of their officers.(*e*)

Accordingly, in the cases before referred to of actions against the Postmaster General for the loss of letters, we find it admitted on all hands, that the servant through whose negligence the letters were lost would have been liable to actions at the suit of the parties injured, and the only question made was as to the liability of the master. "As to an action on the case lying against the party really offending," said Lord Mansfield,(*f*) "there can be no doubt of it; for whoever does an act by which another person receives an injury, is liable in an action for the injury sustained. If the man who receives a penny to carry the letters to the post office loses any of them he is answerable: so is the sorter in the business of his department. So is the postmaster for any fault of his own." Upon this principle, in several cases, the deputy postmaster has been held liable for the non-delivery of letters which it was his duty to have delivered.(*g*)

There is also a large class of cases, which may be conveniently noticed in this place, in which public officers, in a merely ministerial capacity,(*h*)

(*b*) Story on Ag. sect. 310.

(*c*) 1 Roll. Abr. 95. See Com. Dig., tit. "Action upon the case for a Deceit," B.

(*d*) See Mr. Justice Coleridge's ed. of Bl. Comm. vol. 1, 431, note (11); Story on Ag. 310, note (1); Smith's Merc. Law, 155, note (*k*); Paley on Ag. 399, note.

(*e*) In a recent case, however, it was held, that the captain of a man-of-war who had committed an act of trespass in the public service, which was subsequently ratified by the *ministers of state*, was not liable to an action at the suit of the party injured, who had his remedy, such as it was, against the Crown only; Buron v. Denman, 2 Exc. 167.

(*f*) In Whitfield v. Lord Le Despencer, Cowp. 765.

(*g*) Stock v. Harris, 5 Burr. 2709; Barnes v. Foley, ibid. 2711; Rowning v. Goodchild, ibid. 2715; S. C. 3 Wils. 443; 2 W. Bl. 906.

(*h*) But no action lies against persons acting in a *judicial* capacity; Groenvelt v. Burwell, 1 Ld. Raym. 454. See Miller v. Seare, 2 W. Bl. 1145; Doswell v. Impey, 1 B. & C. 163.

have been held liable to answer, in an action at the suit of the party injured, for negligence in the performance of the duties cast upon them. Thus, for instance, a sheriff, whose duty in many cases, such as the receipt, execution, and return of writs, is that of a merely ministerial officer, is liable to be sued by the party aggrieved for any act of irregularity, misfeasance, or non-feasance in executing writs.(*i*)

*But an action by the party grieved does not generally(*k*) lie against an *undersheriff* for a breach of duty in the office of sheriff; [*220] the action must be brought against the high sheriff, as for an act done by him,(*l*) and if it proceeds from the default of the undersheriff or bailiff, that is a matter to be settled between them and the high sheriff.(*m*)

A returning officer at an election of members of parliament was held, by the House of Lords, in the great case of Ashby v. White, to be liable to an action for maliciously refusing to receive the vote of a person entitled to vote.(*n*)

And the case of Perring v. Harris,(*o*) which was an action against an overseer of the poor for maliciously omitting to insert the plaintiff's name in the poor-rate, whereby she was prevented from obtaining a license to sell beer, was one of a similar nature.

So, lottery commissioners have been held liable to an action for not adjudging a prize to the holder of a ticket, entitled to receive it.(*p*)

And so a collector of customs, appointed by the commissioners under the stat. 3 & 4 Wm. 4, c. 51, was held liable(*q*) to an action, at the suit of the party grieved, for nonfeasance in the exercise of his office, viz., for *refusing to sign a bill of entry of certain goods without payment [*221] of an excessive duty. In giving judgment in that case, Lord Denman, C. J., said, "The defendant is a public ministerial officer, and, being so, he is responsible for neglect of his duty to any individual who sustains damage by such neglect. Schinotti v. Bumsted,(*r*) is a strong authority to this effect,—the facts in that case respecting the commissioners of the lottery, tending much more to raise a doubt whether the defendants had not a judicial discretion entrusted to them; and in Lacon v. Hooper,(*s*) which was an action against the commissioners of customs for not making a certain order for the payment of money, to which the

(*i*) Bac. Abr., tit., "Sheriff;" Watson's Sheriff, 117.

(*k*) In certain cases it does by act of parliament. See Cowp. 405. And in Ireland, all actions may, by 57 Geo. 3, c. 68, s. 3, be brought against the undersheriff, unless for the immediate act of the sheriff.

(*l*) For the undersheriff ought to act in the name of the high sheriff. See Wats. Sheriff, 37, and Stroud v. Watts, 2 C. B. 929; S. C. 3 D. & L. 799; Reg. v. Schlesinger, 10 Q. B. 670.

(*m*) Cameron v. Reynolds, Cowp. 403.

(*n*) 2 Ld. Raym. 938; S. C. 1 Salk. 19; 6 Mod. 45; 1 Smith's L. C. 105; and see Cullen v. Morris, 2 Stark. 577; Pryce v. Belcher, 3 C. B. 58; S. C. 4 D. & L. 238, which were similar actions, and from which it would seem that *malice* is a necessary ingredient in such action, as the returning officer is partly a judicial and partly a ministerial officer, though it was formerly thought otherwise. See per Holroyd, J., in Doswell v. Impey, 1 B. & C. 165.

(*o*) 2 Moo. & Rob. 5. (*p*) Schinotti v. Bumsted, 6 T. R. 646.

(*q*) Barry v. Arnaud, 10 A. & E. 646; and see Barrow v. Arnaud, 8 Q. B. 595, where it was not even suggested that the defendant was not liable to be sued, if the duty claimed in that case was excessive.

(*r*) 6 T. R. 646. (*s*) Ibid. 224.

plaintiffs claimed to be entitled under an act for the encouragement of the South Sea whale fishery, it was not questioned but that even they would be liable to the action, if the neglect of duty were made out."

[*222] *CHAPTER VII.

THE SERVANT'S CHARACTER.

The Character—Defamation 222 | False and forged Character—Statute 32 Geo. 3, c. 56 251

THE CHARACTER—DEFAMATION.

THE giving a character of a servant, says the learned author of the Treatise on Slander,(a) is one of the most ordinary communications which a member of society is called on to make, but it is a duty of great importance to the interests of the public; and in respect of that duty a party offends grievously—against the interests of the community in giving a character where it is not deserved, or—against justice and humanity in either injuriously refusing to give a character, or in designedly misrepresenting one to the detriment of the individual.

It is clear, however, that in the absence of any specific agreement to that effect, there is no *legal* obligation binding a person who has retained another as a servant, to give that person any character at all on dismissal, and that no action will lie against him for refusing to do so. Where, therefore,(b) an action was brought by a servant against her master for wholly refusing to give her any character whatever on dismissal, by reason of which refusal one S. refused to hire her; Lord Kenyon said the action could not be supported: that in the case *of domestic and menial [*223] servants, there was no law to compel the master to give the servant a character; it might be a duty which his feelings might prompt him to perform, but there was no law to enforce the doing of it.

And where a master does give a discharged servant a character,(c) what he says or writes upon the subject, to a person bona fide inquiring, is, in general, looked upon as a *privileged communication*, and no action

(a) Stark. on Slander, vol. 1, p. 293. (b) Carrol v. Bird, 3 Esp. 201.

(c) Where A., who had been a servant to G., applied to D. for a situation, and D. agreed to take her if in answer to a letter written to G. a satisfactory reply was received: D. wrote to G. for A.'s character, and G. answered the letter by post, directing the reply to D.; but A., wishing to intercept the letter, went to the post office, stated that she was D.'s servant, obtained the letter, and then burnt it: it was held by the fifteen Judges that this was larceny; Reg. v. Jones, 2 Carr. & K. 236; S. C. 1 Den. C. C. 188.

whatever can be maintained by the servant against him on account of it, if done bona fide, and without any malicious feeling on his part against his late servant. In order to support any action, it must be proved that the character given was false, and also that it was *maliciously given.* It is not sufficient to prove that the character was false, if given bona fide, for, as observed by Lord Denman in Fountain v. Boodle,(*d*) even though the statement should be untrue in fact, the master will be held justified by the occasion in making that statement, unless it can be shown to have proceeded from a malicious mind. If, however, the party giving the character *knows* what he says to be untrue, that may deprive him of the protection which the law throws around such communications when made bona fide.(*e*)

*In ordinary cases of slander, the law implies such malice as is necessary to maintain the action. And therefore in such cases, [*224] it is sufficient to charge that the defendant spoke the words complained of *falsely;* it is not necessary to state that they were spoken *maliciously.*(*f*) But in actions for such slander as is prima facie excusable on account of the cause of speaking or writing it, as in the case of servants' characters, confidential advice or communications to persons who ask or have a right to expect it, *malice in fact must be proved* by the plaintiff.(*g*)

Therefore, where an action was brought(*h*) by a servant against her former mistress for saying to a lady, who came to inquire her character, that "she was saucy and impertinent, and often lay out of her own bed, but was a clean girl and could do her work well;" though the servant proved that she was, by this means, prevented from getting a place, yet, per Lord Mansfield, this is not to be considered as an action in the common way for defamation by words, but that *the gist of it must be malice,* which is not implied from the occasion of speaking, but *should be directly proved;* that it was a confidential declaration and ought not to have been

(*d*) 3 Q. B. 12, post, p. 230.

(*e*) Per Lord Ellenborough, C. J., in Hodgson v. Scarlett, 1 B. & Ald. 240. The servant, if charged with dishonesty and misconduct in the defendant's service, is at liberty to prove his good character and conduct in former services, since general character is in some respects in issue; King v. Waring, 5 Esp. 13. So the plaintiff may prove, by the evidence of other servants in the same family, that whilst he remained in the defendant's service he conducted himself well, and that no complaints of the nature ascribed to him by the defendant then existed, 3 B. & P. 589. The tendency and bearing of this evidence is to shew that the defendant *knew* that the character which he gave was false: the plain reason for this is, that the knowledge of misconduct frequently rests with the defendant himself, and being unable to prove it by the testimony of others, if the general presumption of bona fides on the part of his master were to operate against him, he would be left without defence. To prevent such inconvenience the law requires malice to be proved from other sources. In case however, the plaintiff should be able expressly to prove that the defendant was aware of the falsity, no further proof of malice would be requisite, nor indeed could stronger proof of it be adduced than that the defendant had given a character of the plaintiff injurious to his reputation with a full knowledge that it was untrue; 2 Stark. on Slander, 58.

(*f*) Styles, 392; Mercer v. Sparks, Owen, 51; Noy, 35; and see per Le Blanc, J., in Rex v. Creevey, 1 M. & S. 282; Rowe v. Roach, 1 M. & S. 304.

(*g*) See per Bayley, J., in Bromage v. Prosser, 4 B. & C. 254, 256; 1 Stark. on Slander, 292.

(*h*) Edmondson v. Stevenson, B. N. P. 8.

disclosed. But if without ground, and purely to defame, a false character should be given, it would be a proper ground for an action. The same learned Judge, on several other occasions, laid down similar law. [*225] And, in *all subsequent cases, such has been universally considered to be the rule;(*i*) the struggle, on the part of the plaintiff, in actions for defamation by a servant against a master, being, generally, to shew that the words complained of, were uttered under such circumstances as shewed express malice on the part of the defendant.

"The rule," said Lord Campbell, C. J., in a recent case,(*k*) "is, that if the occasion is such as will repel the presumption of malice, then it is a privileged communication, and *it lies on the party complaining to shew that malice existed*, and, if he does not shew that by evidence, then it is the office of the judge to say that there is no evidence to go to the jury, and to nonsuit or direct a verdict for the defendant. If that were not so, the question must be left, in every case to the jury, and they might be justified in finding a verdict for the plaintiff. So that if a man gives a character to a servant fairly and honestly, still it must be left to the jury to say whether or not there was malice; and it would be competent to them to find a verdict with damages, in a case where nothing had been done beyond fairly giving a character to a servant."

It is is not, however, sufficient to entitle the plaintiff to have the question of malice left to the jury, that the facts proved should be merely *consistent with* the presence of *malice* as well as with its absence, for the existence of malice is consistent with the evidence in all cases, except those in which something inconsistent with malice is shown in evidence; so that, to say, that in all cases where the evidence was consistent with malice it ought to be left to the jury, would be, in effect, to say, that the jury might find malice in any case in which is was not *disproved* which would be inconsistent with the admitted rule, that in cases of privileged [*226] communications malice *must be proved, and, therefore, its absence presumed till proof is given. It is certainly not necessary, in order to enable a plaintiff to have the question of malice submitted to the jury, that the evidence should be such as necessarily leads to the conclusion that malice existed, or that it should be inconsistent with the non-existence of malice; but it is necessary that the evidence should raise a probability of malice, and be more consistent with its existence than with its non-existence.(*l*)

Since then, the liability of a master to an action for defamation, in consequence of the character given by him to a discharged servant, so completely depends upon the existence of express malice on his part, it

(*i*) See Hargrave v. Le Breton, 4 Burr. 2425; Weatherston v. Hawkins, 1 T. R. 111; Lowry v. Aikenhead, Mich. 8 Geo. 3, cited in Rogers v. Clifton, 3 B. & P. 594. See per Tindal, C. J., in Hooper v. Truscott, 2 Bing. N. C. 457, and Smith v. Thomas, 2 Bing. N. C. 381. In Child v. Affleck, 9 B. & C. 406, Parke, B., said, "The rule laid down by Lord Mansfield in Edmondson v. Stevenson, has been followed ever since." And see the cases cited 1 Wms. Saund. 130.

(*k*) Taylor v. Hawkins, 20 L. J., N. S., Q. B., 313; and see per Lord Denman, C. J., in Kelly v. Partington, 4 B. & Ad. 702.

(*l*) Per Maule, J., in Somervill v. Hawkins, 20 L. J., N. S., C. P., 133; and see Taylor v. Hawkins, ubi supra.

will be desirable to set before the reader some of the cases in which the circumstances have been such as to shew express malice on the part of the master, who has accordingly, in such cases, been held liable.(*m*)

In Rogers v. Clifton,(*n*) it appeared that the plaintiff, having been hired as a servant by the defendant, lived six months in his service, when the latter turned him away without giving him a month's warning, in consequence whereof, the plaintiff conceiving himself entitled to a month's wages, refused to quit the service without being paid that sum. On this refusal the defendant procured a police officer to put the plaintiff out of the house, and employed his attorney to settle his wages with him. Immediately after this the defendant called on M. with whom the plaintiff had previously lived, to inform him that the plaintiff had behaved in an impertinent and scandalous manner, that the defendant had discharged him, but he refused to go without a month's wages, and the defendant, therefore, desired M. not to give him another character. The plaintiff afterwards offered himself to H., who wrote to the defendant for his character, and the defendant in reply, said he was a bad-tempered *lazy impertinent fellow," and had given him a great deal of trouble, whereupon H. refused to hire the plaintiff. The plaintiff brought an action against the defendant for defamation, and proved, by servants of the family, that while in the defendant's service, he had conducted himself well, and that no complaints of the nature ascribed to him, in the defendant's letter, had all that time existed. The jury found a verdict for the plaintiff, and a rule nisi, which had been obtained by the defendant to enter a non-suit, was afterwards discharged, on the ground that the character given by the defendant was proved to be untrue, and his conduct shewn to be malicious by his officious interference in going to the plaintiff's former master. [*227]

In Pattison v. Jones,(*o*) the defendant having discharged his servant, the plaintiff, and hearing that he was about to be engaged by B., wrote to B. and informed him that he had discharged the plaintiff for misconduct. B. having desired further information, the defendant wrote a second letter to him, stating the grounds on which he had discharged the plaintiff. It was held, in an action by the servant against the defendant for the libel contained in the *second* letter, that, assuming the letter to be privileged, it was a question for the jury whether the second letter, was written bona fide, or maliciously with intent to injure the plaintiff; and the jury having found a verdict for the plaintiff, the Court refused to disturb it. Bayley, J., stating it as his opinion, that a master "may (when he thinks that another is about to take into his service one whom he knows ought not to be taken) set himself in motion and do some act to induce that other to seek information from and put questions to him. The an-

(*m*) The circumstances under which the master and servant parted, any expressions of ill will uttered by the former, his officiciously acquainting others with the servant's misconduct, without any previous application to him for a character, are all facts which are proper for the consideration of a jury to enable them to form their opinion on the question of intention. See Stark. on Slander, 58.

(*n*) 3 B. & P. 87.

(*o*) 8 B. & C. 578. The action was brought on the second letter.

swers to such questions, given bona fide with the intention of communicating such facts as the party ought to know, will, although they contain slanderous matter, come within the scope of a privileged communication. But in such a case it will be a question for a jury whether the defendant has acted bona fide, intending honestly to discharge a duty, or whether he has acted maliciously, intending to do an injury to the servant."

In Kelly v. Partington,(*p*) the plaintiff had been in the defendant's [*228] service as shopwoman, but was discharged. *S., who was going to hire the plaintiff, inquired her character of the defendant, who charged her with having secreted money taken from his till, and also stated that when she came into his service she borrowed half a sovereign of her mother, and that before she had been there two months, and before she had received any wages, she paid her mother the money and made her a present of a sovereign. The plaintiff's brother-in-law, A., afterwards called upon the defendant for an explanation of the words, when he repeated the same charges; whereupon A., with reference to the other statement, observed that the defendant, no doubt, made entries in some book of the times at which he paid his servants' wages, and that, on reference to it, he would probably find that he was mistaken in what he had asserted. The defendant then went to his desk, took out a memorandum book, and looked at it; after which he turned to A. and asked, "Do you know when she received her wages?" A. answered, "No," but he would go by the defendant's account, as that was likely to be correct. The defendant then said, "If you do not know, I am not going to tell you;" and put the book into the desk again. A., upon this, made some allusion to intended proceedings at law, and said he considered the case of theft as trumped up; to which the defendant made no answer, but "grinned" in a contemptuous manner at A., and upon his remonstrating and observing that if the plaintiff had not had friends she might have gone upon the town, the defendant said (speaking of himself and his wife,) "What is that to us?" Evidence was then given in contradiction of the defendant's statement as to the time the plaintiff repaid the half sovereign. Upon this case the defendant's counsel urged that the plaintiff should be nonsuited, on the ground that there was no proof of express malice. But Patteson, J., before whom the case was tried, refused to nonsuit the plaintiff; and in the following Term an application on the part of the defendant for leave to enter a nonsuit was refused by the Court of Queen's Bench, as there were circumstances, though slight, from which malice might be inferred.

In Fountain v. Boodle,(*q*) the plaintiff, a young person who had been educated for a governess, was engaged by the defendant, Mrs. B., in November, 1839, as daily governess to instruct young children, which [*229] employment *she retained about fourteen months. During that period, D., sister-in-law of the defendant, being in want of an instructress for her children, Mrs. B. recommended the plaintiff to her for that purpose; and in September, 1840, S., wanting a person to instruct

(*p*) 4 B. & Ad. 790. (*q*) 3 Q. B. 5.

his wife, a very young lady, in the several branches of a plain English education, Mrs. B. recommended the plaintiff to him for that purpose. From the 19th to the 23rd of November, 1840, the plaintiff was prevented, by illness, from attending at Mrs. B.'s, and on her return to her employment there, a letter was given to her from Mrs. B., dated 19th November, informing her that her services would not be required beyond the 19th of December, but without assigning any reason. At the latter date she ceased, accordingly, to instruct the defendant's children. In September, 1841, plaintiff was about to be engaged by N., as instructress for her children; and N. applied by letter to Mrs. B., respecting the plaintiff's character in the following terms:—"I shall be obliged by your informing me whether you consider her competent to undertake the instruction of little girls from nine to thirteen years of age (with assistance in music only,) and if you were perfectly satisfied with her tuition, also for what reason you declined her attendance; and whether you consider her a person of good principles and ladylike deportment, of a mild but firm disposition. I will thank you to reply to this question at your earliest convenience; and for any other observations you may think proper to make, I shall feel obliged." To this application, Mrs. B. replied in the following letter, the alleged libel:—"In answer to your inquiries respecting Miss F., I beg to say she had to instruct five of my children from three to nine years old; it is about a twelvemonth since I employed her, and she taught them as a daily governess for fourteen months, and engaged herself to teach everything but music, which she knew nothing of; and I parted with her on account of her incompetency, and not being ladylike nor good-tempered. When I engaged her she recommended a young friend of her's to teach the music, whom I was much pleased with, I discontinued *her* services when I took another governess." To this was added a postscript, "May I trouble you to tell her that this is the third time I have been referred to. I beg to decline any more applications." N., in consequence, broke off her engagement with the plaintiff, which was *the special damage complained of. The two applications alluded to in the postscript were those of D. and S. General [*230] evidence was given of the plaintiff's competency, good temper and manners, by her personal friends. There was no direct evidence of the ground of dismissal. The defendant's counsel contended, that the communication was privileged: but Lord Denman C. J., refused to nonsuit the plaintiff, and left it to the jury to say, whether, looking at the whole case, there was sufficient proof that Mrs. B., in writing the letter, had been influenced by some improper feeling towards tho plaintiff to make a false statement knowingly: and they found a verdict for the plaintiff. In the following term, a rule for a new trial, on the ground of misdirection, and of the verdict being against the weight of evidence, was applied for but refused. And Lord Denman, C. J., said, "A character bona fide given to a servant of any description, is a privileged communication, and in giving it bona fides is to be presumed. Even though the statement should be untrue in fact, the master will be held justified by the occasion in making that statement, unless it can be shewn to have proceeded from

a malicious mind. Malice may be established by various proofs; one may be, that the statement is false to the knowledge of the party making it. Up to this point the summing up was not complained of; but another part of it was brought before the Court as objectionable. The misstatement here imputed was, that the defendant had discharged the plaintiff by reason of her faults enumerated in the letter. This could be known to nobody besides the defendant; but she might have shewn the probability of that being the real motive from remonstrances made by her during the plaintiff's attendance, or complaints at its being terminated. I told the jury to the effect, that if the plaintiff brought any evidence of wilful untruth, some evidence of the contrary might be reasonably expected, where the nature of the case allowed it. This is a general proposition, applicable to every form of action and to evidence of all kinds.

"The Court wished for time to consider whether there was, in the present case, any evidence of wilful falsehood in the character given." His lordship then went through the evidence, and added, "Here was undoubtedly *some* evidence of the injurious character being dictated by some indirect motive. Of course, then, it must be laid before the jury. [*231] But the learned counsel *contends, that it is so extremely slight that, though uncontradicted in any particular, the jury ought to have found a verdict against its sufficiency. He observes, that the privilege is but illusory, if circumstances so minute can be raised into proof of malice. Much more illusory would it be to hold, that there was evidence on which the jury must decide, but that they must decide one way, or the verdict cannot stand.

"We cannot place ourselves in their stead and impose our own judgment upon them. They have advantages for attaining the truth which we do not possess, and are the proper tribunal for that purpose. They were bound to decide upon the weight of the evidence laid before them, and we cannot say that they have done wrong in the present instance."

In a case where(*r*) it appeared that the plaintiff was servant to W. C., whose wife called on Mrs. Webb and asked how her (Mrs. C.'s) sister had behaved to the plaintiff during Mrs. C.'s absence in the country; whereupon Mrs. Webb said, "Mrs. C., you are not aware what kind of servant you have, if you were, you would not keep her, for I can assure you she is often out with our married man: she was out with him last Sunday morning, and when you were in the country, she was out gossiping till eleven or twelve o'clock at night;" upon which the mistress discharged her servant: and it appeared that Mrs. C. had on a previous occasion, asked Mrs. Webb to look after her servant: Coltman, J., left it to the jury to say whether the words were spoken with the honest intent of giving a neighbour important information of what was going on in his family, or whether it was done in an idle, gossiping, and malicious spirit. They found a verdict for the plaintiff, and the Court afterwards refused to disturb their finding.

The defendant's conduct in putting a justification upon the record

(*r*) Rumsey v. Webb, Carr. & M. 104.

which he does not attempt to prove, and will not abandon, may be taken into consideration as proving malice, and aggravating the injury. And if the defendant's conduct in that respect may at all affect the verdict, every other part of his conduct may equally be laid before the jury; refusing to make reparation for unjustifiable slander may have that effect; and the malice proved to exist at the time of the trial, but connected *with the subject-matter of it, may well be believed to have [*232] existed at the time of speaking the words.(s)

But in the following case(t) it was held, that the facts proved were *not* evidence of malice. The plaintiff, had been in the service of the defendants, Mrs. A. having, before she hired her, made inquiries of two persons who gave her a good character. The plaintiff remained in the defendant's service a few months, and was afterwards hired by another person, who wrote to Mrs. A. for her character, and received the following answer, the alleged libel: "Mrs. A.'s compliments to Mrs. S., and is sorry that in reply to her inquiries respecting E. Child, nothing can be in justice said in her favour. She lived with Mrs. A. but for a few weeks, in which short time she frequently conducted herself disgracefully; and Mrs. A. is concerned to add, she has since her dismissal been credibly informed she has been, and now is, a prostitute in Bury." In consequence of this letter the plaintiff was dismissed from her situation. It further appeared, that after that letter was written, Mrs. A. went to the persons who had recommended the plaintiff to her, and made a similar statement to them. But there was no evidence of the good conduct of the plaintiff at the period to which the letter referred. It was held, that the letter was privileged, and the other communications having been made to persons who had recommended the plaintiff, were not evidence of malice. The plaintiff was non-suited, and two of the learned Judges(u) expressed opinions that Mrs. A. would have stopped short of her duty in withholding the information contained in the latter part of the letter.

From these cases the reader will have deduced the rule which prevails in cases of this sort, that it is the duty of the Court to decide whether or no the communication containing the defamatory matter complained of comes within the class of privileged communications, and if it does not come within that class, then it is for the jury to decide as to the existence or non-existence *of any malicious motives in the mind of [*233] the defendant making it.(v)

In most of the cases hitherto mentioned, the alleged defamation has taken place in some communication between a *former master* and a *person about to* hire a discharged servant. But it frequently happens that defamatory opinions are uttered, and expressions used with reference to the character of servants by their masters in communication with other persons, and by other persons in communication with their master. It is important, therefore, to inquire how far such communications are within the protection which, as we have seen, the law throws around communica-

(s) Simpson v. Robinson, 12 Q. B. 511. See further on this point Wilson v. Robinson, 7 Q. B. 68; Warwick v. Foulkes, 12 M. & W. 507.

(t) Child v. Affleck, 9 B. & C. 403. (u) Bayley, J., and Littledale, J.

(v) But see Taylor v. Hawkins, ante, p. 225.

tions made by the master to a person inquiring the character of a discharged servant; in other words, how far such communications are privileged.

It must be observed, however, that as the reason why communications of the nature last referred to are held to be privileged, does not arise from the existence of the relationship of master and servant between the parties defamed and defaming, but from principles of public policy and convenience, it would seem to be more consistent with those principles that the rule should be co-extensive with them than that it should be confined to one particular class of cases, to which, in common with others, they are applicable. Accordingly, it will be found that a variety of communications come within the class which are held to be privileged, and that the cases already mentioned are to be regarded rather as examples of the application of a general rule to a particular class of cases, than as forming of themselves a class from which a rule may be deduced. The general rule is, indeed, far more extensive in its application, and cannot perhaps be better expressed than is done by Parke, B., in Toogood v. Spyring.(*w*) "In general, an action lies for the malicious publication of statements which are false in fact, and injurious to the character of another, (within the well known limits of a verbal slander,) and the law considers such publication as malicious, *unless it is fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs in matters where his interest is concerned.* In [*234] such cases the occasion prevents the inference of *malice which the law draws from unauthorized communications, and affords a qualified defence depending upon the absence of actual malice. If *fairly* warranted by any reasonable occasion or exigency, and honestly made, such communications are protected for the common convenience and welfare of society; and the law has not restricted the right to make them within any narrow limits."

It is not, however, necessary here to follow out the application of the rule thus laid down to all the cases to which it has been applied. It will be sufficient to lay before the reader those cases which bear more immediately upon the subject now under consideration, to which it has been held applicable. And in doing so, it will be convenient to consider,

I. Communications made in the discharge of a public duty.
II. Communications made in the discharge of private duty; and
III. Communications made by a person in the conduct of his own affairs in matters where his interest is concerned.

I. Communications made in the discharge of a *public* duty.

To this class may be referred the cases in which communications made in the course of judicial proceedings(*x*) have been held to be privileged.

(*w*) 1 C. M. & R. 193, post, p. 243.

(*x*) See 1 Stark. on Slander, 239, 254. Such communications may, however, where the circumstances admit of it, be made the subject of an action for *malicious prosecution.* See Cutler v. Dixon, 4 Rep. 14 *b.* Want of jurisdiction in the court before which the proceedings take place, appears to make no difference in the privilege. See the cases cited in the note to Buckley v. Wood, 4 Rep. 14 *b*, (Thomas and Fraser's ed.;) Lake v. King, 1 Wms. Saund. 131 *b*, and note (*k*); 1 Stark. on Slander, 253. As to

Thus, in Trotman v. Dunn,(*y*) where the facts were shortly these. The plaintiff, on his return from transportation, served the defendant as journeyman baker, but was suddenly dismissed by him. He then claimed a week's wages, and to enforce this demand summoned the defendant before a Court of Conscience. While they *were attending there, the defendant said of the plaintiff, "He has been transported [*235] before, and ought to be transported again. He has been robbing me of nine quartern loaves a week." And the plaintiff brought this action. It did not appear distinctly in what stage of the proceedings the words complained of were spoken, or to whom they were addressed. For the defendant, it was contended, that the words having been used in a court of justice, were privileged. And Lord Ellenborough, C. J. said, "If it had been proved that the defendant spoke these words in opening his defence to the commissioners of the Court of Conscience, I should immediately have directed a non-suit. This would have been a privileged communication, and the words could not be considered as spoken maliciously in the manner and form stated in the declaration. If the plaintiff had been robbing the defendant, the latter was justified in dismissing him immediately, and no claim to a week's further wages could exist. The Court of Conscience had to decide upon the propriety of the ground of dismissal. Therefore, if the defendant used the words in a judicial mode, for the purpose of his defence, he is justified. On the contrary, if he spoke them *ad invidiam*, and in a calumniatory manner, they are actionable, though uttered in the room where the Court of Conscience was sitting." The defendant had a verdict.

Slanderous words spoken to a constable on giving a servant into custody, on a charge of stealing, have also been held to come within the same category. Thus, in Johnson v. Evans,(*z*) which was an action for slander. The words were, "She is a thief, and tried to rob me of part of her wages." The plaintiff had been servant to the defendant. Upon a dispute taking place he discharged her, and some difference arising respecting the payment of her wages, he charged her with having attempted to cheat him respecting her wages, and used the words as laid, but the plaintiff failed in proving them to have been spoken at that time. Having, however, sent for a constable in order to take her into custody, he used the same words to the constable when he came, to whom he meant to have given her in charge, but which, in fact, he did not do. It appeared from the evidence of the constable, that the words were addressed *to him in his character of constable, and in the course of the charge and [*236] complaint which the defendant made to him against the plaintiff. Lord Eldon, C. J., non-suited the plaintiff, saying, "that words used in the course of legal or judicial proceedings, however hard they might bear on the party of whom they were used, were not such as would support an action for slander. In this case they were spoken by the defendant under a belief of the fact, and when he was about to proceed legally to punish

how far a magistrate or judge is privileged in his observations, see Kendillon v. Maltby, Carr. & M. 402.

(*y*) 4 Camp. 211.

(*z*) 3 Esp. 32; but see Smith v. Hodgeskins, Cro. Car. 276.

it. It would be a matter of public inconvenience, and operate to deter persons from preferring their complaints against offenders, if words spoken in the course of their giving charge of them or preferring their complaint should be deemed actionable."

To this class may also, perhaps, be referred the cases already mentioned, in which communications, made by a master, respecting the character of a discharged servant, have been held to be privileged, though some may think that they more properly belong to the class next to be considered, viz. :—

II. Communications made in the discharge of a *private* duty.

In this class may be included, in addition to the cases already mentioned, in which a character given to a discharged servant has been held to be a privileged communication, the cases in which masters, after having given a discharged servant a bad character, have *repeated* it to the friends or relations of the servant upon being called upon by them for an explanation of the bad character given, which has lost the servant a place. Such communications have been held to be privileged when made bona fide; though, as we have already seen in one such case,(*z*) the repetition of a bad character, when accompanied by a "contemptuous grin," was held to be slight evidence of malice.

In Weatherston v. Hawkins,(*a*) the plaintiff brought an action against his former master for publishing the following letter to C., the plaintiff's brother-in-law, respecting the plaintiff's character as a servant, "Two days I gave him money to go into the city and buy books. When he came home I desired him to reckon up his account; he did so. But being one day more *curious than I sometimes was, I looked over his [*237] account, article by article, and in one, a book I well knew the price of, I found he had charged me one shilling more than it cost, and that shilling he kept in his pocket. The next day the very same affair. And both the days my neighbour Metcalf was in my shop, and knows it well, and said he would not keep such a man a day, or something to that purpose. Two magazines he charged two shillings for binding, the people received no more than one and eightpence, and say he paid no more. This I can prove." It appeared that the plaintiff had been in the service of the defendant, and was by him turned away. Rogers, to whom the plaintiff was recommended as a servant, applied to the defendant for a character, which not being good, Rogers declined to take him. Upon this, C. called repeatedly upon the defendant, upon which the above letter was written, in order to prevent an action for the words spoken to Rogers by the defendant. But the present action was brought. It was, however, held by Lord Mansfield, C. J., and other judges, that it would not lie, as, instead of the plaintiff's showing the libel complained of to be false and malicious, it appeared to be incident to the application by Rogers to the master of the servant. And the letter was written to the brother-in-law of the plaintiff for the express purpose of preventing an action being brought.(*b*)

(*z*) Kelly v. Partington, 4 B. & Ad. 700, supra, p. 228. (*a*) 1 T. R. 110.
(*b*) In King v. Waring, 5 Esp. 15, Lord Alvanley refused to allow a letter to be

And so in Taylor v. Hawkins,(c) it appeared that the plaintiff was a shopman of the defendant, and the defendant, having a suspicion that he had embezzled money in the course of his employment, sent for the plaintiff, and in the presence of a friend Mr. T., uttered the words complained of in the first count, which were, "You pocketed the 5*s.* and altered the cheque, and you intended to alter the book, but being busy at the time it escaped your memory;" and immediately afterwards discharged him. After his discharge, the plaintiff being about to enter the service of B., the defendant was referred *to for a character, but in consequence of what the defendant then stated to him, B. [*238] declined to take the plaintiff into his employment. Upon this the plaintiff's brother called upon the defendant to inquire why he had given the plaintiff such a character as kept him from obtaining a situation; upon which the defendant said, "What would you do yourself if any of your shopmen or servants robbed you?" to which the plaintiff's brother replied, "I hope my brother has not been robbing you." The defendant then said, "He has robbed me: I believe that he has robbed me for years past; I can prove it from the circumstances under which he has been discharged by me." This last answer was what was complained of by the second count of the declaration: it was held, that the occasion on which the communications were made was such as to render them privileged, and that the presence of a third party when they were made did not alone render them not so.

In this class may also be included communications bona fide made by a master to his *other servants* respecting the character of a discharged servant.

Thus, where,(d) the plaintiff, who had been in the service of the defendant, and had been dismissed on a Thursday on a charge of theft, came on the following Saturday upon the defendant's premises for the purpose of receiving wages which were due to him, and then had some communication with the defendant's servants, when the defendant said to them, "I have dismissed that man for robbing me. Do not speak to him any more in public or private, or I shall think you are as bad as him." This was held to be a privileged communication; and the plaintiff having brought an action for slander against his master, was nonsuited: Lord Truro ruling that, in the absence of any other evidence of express malice on the part of the defendant, there was no case to go to the jury; and this ruling was afterwards upheld by the Court of Common Pleas.

Communications made by a tenant to his landlord respecting the character of a servant about to be hired by the latter, have also been held to be privileged.(e) *Thus where(f) the father of the plaintiff [*239]

given in evidence which had been procured by the plaintiff from the defendant by means of another letter, not written with a fair view of inquiring a character, but to procure an answer upon which to ground an action for libel; and see 3 B. & P. 592.

(c) 20 L. J., N. S., Q. B., 313.

(d) Somervill v. Hawkins, 20 L. J., N. S., C. P. 131.

(e) As to how far a communication by a landlord to his tenant reflecting on the character of the tenant's servants is privileged, see Knight v. Gibbs, 1 A. & E. 43.

(f) Cockayne v. Hodgkinson, 5 C. & P. 543.

had been for some years gamekeeper to the marquis of Anglesey, and the plaintiff wished to become his lordship's gamekeeper and overlooker of fences for a farm of which the defendant, an old man, was tenant, &c., the defendant sent a letter to the Marquis, informing him, amongst other things, that the plaintiff encouraged poachers and sold game: Mr. Justice Parke left it to the jury to say whether it was the duty of the defendant to make communications to the Marquis in respect of any neglect of duty in his gamekeepers; and said that, "if he was desired to do so by the noble Marquis or his agents, any communication he made would be privileged, if he wrote it bona fide and considering that he was doing his duty to the Marquis as his landlord. If it was the duty of the defendant to make the communication, the case falls within the principle of many other cases. To write of another that he is a thief, is a libel; but if one gentleman asks another gentleman respecting a servant's character, and he writes that the servant was a thief, he is protected if he acts bona fide." His lordship also left the case to the jury on the question of malice, and they found for the defendant.

It may also be proper in this place to mention a case of Cleaver v. Sarraude,(g) where in an action for a libel contained in a letter written confidentially by the defendant to the Bishop of Durham, who employed the plaintiff as steward to his estates, to inform him of certain supposed malpractices on the part of the plaintiff—the Judge who presided declared himself of opinion that the action was not maintainable, as the defendant had been acting bona fide. In that case, however, it is to be observed, that it does not appear in what position the defendant stood with reference to the Bishop of Durham. If he was a perfect stranger to him, it would seem from the subsequent case of Coxhead v. Richards, to which it is now proposed to call the reader's attention, to be extremely doubtful whether the opinion of the learned judge would now be followed, since no duty or interest on the part of the defendant to communicate to the Bishop what he did not know to be true appeared. In [*240] Coxhead v. Richards,(h) the facts were, shortly, *these. The plaintiff was a mariner, and had the command of a ship belonging to W., of which ship Cass, an intimate friend of the defendant, was mate. Cass wrote to the defendant, reflecting in strong terms upon the plaintiff's conduct in a particular voyage, but requesting the defendant *not* to shew the letter to W. On receipt of the letter, however, the defendant shewed it to a naval friend, one of the Elder Brethren of the Trinity House, and also to Soames, an extensive ship owner, and in accordance with their advice communicated it to W., who immediately superseded the plaintiff in his command, and ceased to employ him. The plaintiff, upon this, brought an action for libel against the defendant, and the defendant pleaded a justification, but failed to sustain it; and it did not appear that W. had instituted any inquiry into the charges contained in Cass's letter. On the part of the defendant it was contended that the action would not lie, on the ground that the communication of the letter

(g) Cited by Lord Ellenborough in McDowell v. Claridge, 1 Campb. 268.
(h) 2 C. B. 569. See also Blackham v. Pugh, 2 C. B. 611; Bennet v. Deacon, 2 C. B. 628.

to W. was privileged. And Tindal C. J., told the jury that the occasion and circumstances under which that communication took place furnished a legal excuse for making it; that the plaintiff, to entitle himself to a verdict, must show malice in fact, and the jury must find for the defendant if they thought the communication strictly honest on his part, and made solely in the execution of what he *believed* to be a duty, but for the plaintiff if they thought the communication was made from any indirect motive whatever, or from malice against the plaintiff. The jury found for the defendant; and in the following Term a rule nisi was obtained by the plaintiff for a new trial, on the ground of misdirection. The rule was twice argued, in consequence of a difference of opinion amongst the judges; and, ultimately, the four judges before whom the case was argued differed;—Tindal, C. J., and Earle, J.,(*i*) holding that the communication was privileged, as the defendant bona fide believed, and had reason to believe, the statement to be true, and that it was his duty to communicate it to the plaintiff's master; and Coltman, J. and Cresswell, J., holding that it was *not* privileged, as there was no duty which obliged the defendant to make the communication without ascertaining its truth.

III. Communications made by a person in the conduct of his own affairs, where his interest is concerned. [*241]

Communications of this sort have also frequently been held to be privileged, when made bona fide with a view to the interests both of the writer and the person addressed: for if such communications, which were not meant to go beyond those immediately interested in them, were the subjects of actions for damages, it would be impossible for the affairs of mankind to be conducted. Upon this ground, a letter written by the defendant to Messrs. W., bankers, charging the plaintiff, who was a solicitor, with improper conduct in the management of their affairs, in which the defendant was himself interested, was held to be privileged.(*k*)

So a letter written by one part-owner of a brig to another part-owner, who had recommended the plaintiff as master, reflecting upon the master's conduct, was held to be privileged.(*l*)

But the words spoken by one subscriber to a charity, in answer to inquiries by another subscriber respecting the conduct of a medical officer of the charity, have been held not to be privileged; and in an action for slander, the plaintiff recovered a verdict and damages.(*m*) In that case, however, there did not appear to be a sufficient reason for the conversation between the parties to constitute a privileged communication. And in a subsequent case, Parke, B., said that if those observations had been made

(*i*) And it is said that the opinion of Erskine, J., who retired from the Bench between the first and second argument of the case, was understood to be in favour of the defendant. See the note of the Reporters, 2 C. B. 583.

(*k*) McDougal v. Claridge, 1 Camph. 267. See Wright v. Woodgate, 2 Cr. M. & R. 573; Shipley v. Todhunter, 7 C. & P. 680. In the latter case Tindal, C. J., in summing up to the jury, said, "There can be no doubt that a man has a right to communicate to any other any information he is possessed of in a matter in which they have a mutual interest."

(*l*) Wilson v. Robinson, 7 Q. B. 68. (*m*) Martin v. Strong, 5 A. & E. 535.

in a matter of contest, and the contest was whether the person slandered should be elected, it appeared to him that it would have been a privileged communication. The case alluded to is Kine v. Sewell,(*n*) in which the defendant, having been requested by A. to recommend a person to value some work done for him by the plaintiff's master under contract, told A. [*242] that *the plaintiff had stolen some of the materials, and afterwards repeated the charge to the plaintiff's master; but it was held that the defendant was not liable to an action, without proof of express malice on his part, for although the charge appeared to be untrue, yet the communication having been made bona fide, *to a person interested* in discovering a wrongdoer, and *who made inquiries*, and believed to be true by the defendant, was privileged.

Where a person, having ground, or supposed ground of complaint against a servant or public officer, makes a representation of his conduct to his master or superior officer, with *a view to obtaining redress*, the communication has been held to be privileged, on the ground of interest in the party making it. As where(*o*) a person having a just claim against an officer in the army, and who therefore, in some measure, is subject to the control of the Secretary of War, applied by petition to the latter, in order to obtain, through his interference, the payment of his debt: it was held, that the petition having been published for the purpose of obtaining redress, and not for the purpose of slander, could not be made the subject of an action. And Best, J., cited the King v. Bayley,(*p*) in which a letter addressed to General Willes and the four principal officers of the Guards, to be by them presented to the king, stating that the prosecutor had obtained from the defendant a warrant for the payment of money due to him from government, under a promise of paying the defendant such money, and that the prosecutor had received the money and had not paid it over to the defendant, was held to be no libel, but a representation of an injury drawn up in a proper way for redress: and added, "That case is like the present. Neither the officers nor the king could give the defendant direct assistance in receiving the money wrongfully withheld. But the king had authority to dismiss an officer from his service, and most probably would dismiss any one who hesitated to do what honour and justice required. In the present case there was at least probable cause for thinking that the Secretary of War would advise his majesty that the plaintiff was not worthy to remain in the army, unless he did the defendant immediate justice."

[*243] *So in an action(*q*) for libel upon the plaintiff in his situation of guard of the Exeter mail, by reason of which he was dismissed from his situation: the libel complained of was a letter written to Sir Francis Freeling, chief secretary to his majesty's post master general, by the defendant, who was unconnected with the post office, complaining of some misconduct, of the plaintiff towards the defendant's wife in a journey by the mail: it was held by Taunton, J., that the latter was clearly *not* privileged on the ground of its being an *official* communication;(*r*) but that learned Judge also expressed an opinion, that the occasion on

(*n*) 3 M. & W. 303.
(*o*) Fairman v. Ives, 5 B. & Ald. 642.
(*p*) Bac. Abr., tit. "Libel," A. 2.
(*q*) Blake v. Pinfold, 1 M. & Rob. 198.
(*r*) Within the cases of Home v. Bentick, 2 B. & B. 130; Wyatt v. Gore, Holt, 299.

which the letter was published, rendered its publication excusable, in the absence of express malice. And in another similar case,(*s*) Alderson, B., laid down similar law.

Upon similar principles, a letter, written by a discharged butcher to his customer, reflecting on the honesty of his customer's housekeeper, was held a privileged communication.(*t*)

Where a communication is privileged, the mere fact that a third person was present at the time it was made, will not render it less so. Though, if an opportunity of publishing the libel in the presence of a third person is sought out, that may be evidence of malice. Thus, where(*u*) it appeared that the plaintiff was a journeyman carpenter, and had been in the employ of B., a master carpenter, in the constant employ of the Earl of Devon, at Powderham. The defendant was tenant to the Earl, and required some repairs at his farm, and plaintiff, pursuant to B.'s orders, went with another workman to the defendant's house for the purpose of doing them. The work was done in a negligent manner, and not to the satisfaction of B.: during the progress of the work the plaintiff got drunk, and circumstances occurred which induced the defendant to believe that the plaintiff had broken open the cellar and obtained access to his cider. B. had requested the defendant to inspect the work; and afterwards, whilst the plaintiff and one T. *were at work at Powderham, the defendant came up and, *in T.'s presence*, charged the plaintiff with breaking [*244] open this cellar, getting drunk, and spoiling his job. The plaintiff denied the charges; but defendant said he would swear it, and so would his men. In a subsequent conversation *in the plaintiff's absence*, the defendant, in answer to a question by T., whether he really thought the plaintiff had broken open his cellar, said he was sure of it, and his people would swear to it. Defendant then went away in search of B., whom he saw, and to whom he repeated that the plaintiff had broken open the door, got drunk, and spoiled his job. B. thereupon went to the plaintiff, and told him, that until his character was cleared he could not remain in the employ of the Earl. The next day B. investigated the charge, and told the plaintiff he considered it not made out, and his character was cleared, and he might go to work again; but the plaintiff refused to work, saying his character was not cleared, and brought his action against the defendant. It was held, that the communication to B. was privileged, and that the statement made to T. upon the second meeting, in the plaintiff's absence, was not; but that the statement made *to* the plaintiff, though in the presence of T., was privileged. And in delivering the judgment of the Court of Exchequer, Parke, B., after laying down the principles which have been already cited,(*uu*) said, "Among the many cases which have been reported on this subject, one precisely in point has not, I believe, occurred; but one of the most ordinary and common instances in which the principle has been applied in practice, is that of a former

(*s*) Woodward v. Lander, 6 C. & P. 548.

(*t*) Coward v. Wellington, 7 C. & P. 531.

(*u*) Toogood v. Spyring, 1 Cr. M. & R. 181; and see Padmore v. Lawrence, 11 A. & E. 380; Taylor v. Hawkins, 20 L. J., N. S., Q. B. 313, ante, p. 237.

(*uu*) Ante, p. 233.

master giving the character of a discharged servant; and I am not aware that it was ever deemed essential to the protection of such a communication, that it should be made to some person interested in the inquiry, *alone*, and not in the presence of a third person. If made, with honesty of purpose, to a party who has any interest in the inquiry, (and that has been very liberally construed,)(*v*) the simple fact that there has been some casual bystander, cannot alter the nature of the transaction. The business of life could not well be carried on if such restraints were imposed upon this and similar communications, and if, on every occasion in [*245] which they were *made, they were not protected unless strictly private. In this class of communication is no doubt comprehended the right of a master bona fide to charge his servant for any supposed misconduct in his service, and to give him admonition and blame; and we think that the simple circumstance of the master exercising that right in the presence of another, does by no means, *of necessity*, take away from it the protection which the law would otherwise afford. Where, indeed, an opportunity is sought for making such a charge before third persons, which might have been made in private, it would afford strong evidence of a malicious intention, and thus deprive it of that immunity which the law allows to such a statement when made with honesty of purpose; but the mere fact of a third person being present, does not render the communication absolutely unauthorized, though it may be a circumstance to be left with others, including the style and character of the language used, to the consideration of the jury, who are to determine whether the defendant has acted bona fide in making the charge, or been influenced by malicious motives. In the present case the defendant stood in such a relation with respect to the plaintiff, though not strictly that of master, as to authorize him to impute blame to him, provided it was done fairly and honestly, for any supposed misconduct in the course of his employment, and we think that the fact that the imputation was made in T.'s presence, does not, *of itself*, render the communication unwarranted and officious, but, at most, is a circumstance to be left to the consideration of the jury. We agree with the learned Judge, that the statement to T., in the plaintiff's absence, was unauthorized and officious, and therefore not protected, although made in the belief of its truth, if it were, in point of fact, false."

Where communications made with reference to the character of servants, do not come within the class of privileged communications, they are, of course, subject to the ordinary rules which govern actions for defamation. It is not, however, necessary here to enter into a full examina- [*246] tion of those rules, which have been already treated of in the work before referred to:(*w*) it is *sufficient to state, that in actions

(*v*) Child v. Affleck, 9 B. & C. 403. See this case, ante, p. 232.

(*w*) Stark. on Slander. Neither is it necessary to enter into a discussion of what expressions are, and what are not actionable. It may, however, be remarked, that where the expressions used are capable of a harmless and also of an injurious meaning, the plaintiff is at liberty to point them by *innuendo* to the latter, if, in their ordinary sense, they are capable of such a construction. Thus, in Clegg v. Laffer, 10 Bing. 250, where the defendant, in writing to one of his friends, said of the plaintiff, "He is so inflated with two or three hundred pounds, which he has made in my service,

for slander, the general rule is, that where the natural consequence of the words is a damage; as if they import a charge of having been guilty of a crime, or of having a contagious distemper, or if they are prejudicial to a person in an office, or to a person of a profession or trade, they are, in themselves, actionable; in other cases, the party who brings an action for words must show the damage which he has received from them.(*x*)

From hence, it appears that an action for slander may be maintained by a servant, without proof of special damage, where the imputation affects him in his situation of servant, that is, where it is made with reference to his character or conduct as such, and imputes to him the want of some qualification for or misconduct in his situation.

Thus, in Seaman v. Bigg,(*y*) in the time of Charles I.: it was held, that the words "Thou are a cozening knave, and hast cozened thy master of a bushel of barley," spoken off a bailiff and servant in husbandry, were actionable; "for," said the Court, "though true it is generally an action will not lie for calling one 'cozening knave,' yet where the words are spoken of one who is a servant and accomptant, and whose credit and maintenance *depends upon his faithful dealing, and he, by such disgraceful words, is deprived of his livelihood and means of [*247] maintenance, there is good reason it should bear an action that he might have recompence for his loss of credit and means."

But unless the imputation be connected with the servant's occupation, or shew the want of some general requisite, no action can be maintained in respect of it. "Every authority which I have been able to find," said Bayley, B., in Lumby v. Allday,(*z*) "either shews the want of some general requisite, as honesty, capacity, fidelity, &c., or connects the imputation with the plaintiff's office, trade or business." In that case, therefore, where the defendant said of the plaintiff, who was clerk to the Birmingham and Staffordshire Gas Light Company, "You are a fellow, a disgrace to the town, unfit to hold your situation for your conduct with whores. I will have you in the *Argus*. You have bought up all the copies of the *Argus* knowing you have been exposed. You may drown yourself, for you are not fit to live, and are a disgrace to the situation you hold." Bayley, B., intimated a strong opinion that the charge proved was not actionable; because the imputation it contained did not imply the want of any of those qualities which a clerk ought to possess, and because the imputation had no reference to his conduct as clerk.

And where the plaintiff complains of the imputation of scandalous con-

—God only knows whether honestly or otherwise,—that," &c., and the plaintiff in his declaration explained the words by *innuendo*, thus, "Meaning to insinuate that the plaintiff had conducted himself in a dishonest manner in the defendant's service." The Court of Common Pleas held, that the *innuendo* did not exceed the limits which, according to the definitions in the authorities, it is allowed to make. See further on this point, 1 Wms. Saund. 243 *a*, note (*i*); Griffiths v. Lewis, 8 Q. B. 841. But the *innuendo* must not be too large; Day v. Robinson, 1 A. & E. 554; Wheeler v. Haynes, 9 A. & E. 286. See Williams v. Gardiner, 1 M. & W. 245.

(*x*) Bac. Abr., tit. "Slander," A.; 1 Stark. on Slander, 10.

(*y*) Cro. Car. 480; and see Reginald's case, Cro. Car. 563, where similar words were held actionable when spoken of a deputy clerk to a register. See also Wright v. Moorhouse, Cro. Eliz. 358.

(*z*) 1 Cr. & J. 305.

duct in his occupation, it is necessary for him to set forth, in the declaration, in what manner it was *connected with his occupation* by the defendant.(*a*) And, therefore in an action for slander, of a salaried superintendent of police at Leeds, where the declaration did not shew how the slander was connected by the defendant with the plaintiff's office, judgment was arrested.(*b*)

Where the words complained of by the plaintiff are not actionable per se, it becomes necessary for the plaintiff to allege and prove what is called *special damage, i. e.,* some actual specific injury resulting from the use of the words. And it is also necessary for the plaintiff *to prove [*248] special damage where it is alleged in a declaration for words which are actionable per se. But, in either of those cases, it is said not to be sufficient for the plaintiff to prove a mere wrongful act of a third person induced by the slander, but that the special damage complained of must be the legal and natural consequence of the words spoken. Therefore in an action for slander,(*c*) where the special damage alleged was that in consequence of words used by the defendant, J. O. had discharged the plaintiff, and R. P. had refused to hire him: and it appeared that the plaintiff had been retained by J. O. as a journeyman for a year at certain wages, and that before the expiration of the year his master had discharged him in consequence of certain words spoken by the defendant, who accused the plaintiff of cutting his cordage: and it also appeared that the plaintiff afterwards applied to R. P. for employment, but he refused to employ him, in consequence of the words, *and because his former master had discharged him for the offence imputed to him:* it was held, that the action could not be maintained, as the special damage alleged was not the legal and natural consequence of the words spoken. And Lord Ellenborough added, "Here it was an illegal consequence; a mere wrongful act of the master, for which the defendant was no more answerable than if, in consequence of the words, other persons had afterwards assembled and seized the plaintiff and thrown him into a horsepond by way of punishment for his supposed transgression. Upon the second ground non liquet, that the refusal by R. P. to employ the plaintiff, was in consequence of the words spoken, as it is alleged to be: there was at least a concurrent cause, the act of his former master in refusing to continue him in his employ; which was more likely to weigh with R. P. that the mere words themselves of the defendant."

Upon similar principles, in an action for slander by a shopwoman and servant, for saying of her she secreted 1*s.* 6*d.* under the till, stating, "these are not times to be robbed:"(*d*) in consequence of which it was alleged one S. refused to engage her in his service: judgment was arrest- [*249] ed on the ground that the special damage alleged *was not the natural result of the words used. And Patteson, J., observed, "It is said that the words are actionable, because a person, after hearing them, chose in his caprice to reject the plaintiff as a servant. But if the matter was not in its nature defamatory, the rejection of the plaintiff

(*a*) See Ayre v. Craven, 2 A. & E. 8; Doyley v. Roberts, 3 Bing. N. C. 835; Southee v. Denny, 1 Exc. 196; Hopwood v. Thorn, 8 C. B. 293.

(*b*) James v. Brook, 9 Q. B. 7. (*c*) Vicars v. Wilcocks, 8 East, 1.

(*d*) Kelly v. Partington, 5 B. & Ad. 645; and see Ashley v. Harrison, 1 Esp. 48; Taylor v. Neri, 1 Esp. 396, ante, p. 78.

cannot be considered the natural result of the speaking of the words. To make the speaking of the words wrongful, they must, in their nature, be defamatory."

But these cases have not been altogether approved of :(*e*) and, in a subsequent case, it was held that the discharge of the plaintiff by her employer, in consequence of words used by the defendant, was not too remote an injury to entitle the plaintiff to recover damages in respect of it, the Court distinguishing that case from Vicars v. Wilcocks. The case alluded to is Knight v. Gibbs,(*f*) in which it appeared that the plaintiff and another young woman lodged in the house of E., whose wife was a straw bonnet maker, and employed them in the way of her business. The defendant who was landlord of the house, and lived next door but one, came to Mrs E., and spoke of the plaintiff and her fellow lodger thus: "I am ashamed of their conduct; they were singing and making a noise, and tabouring the windows (*i. e.* tapping them with their fingers;) it is no use their denying it; their conduct is shameful and disgraceful, more like a bawdy-house than anything else, and no moral person would like to have such people in his house." After this Mrs. E. dismissed them, which was the special damage complained of. She gave the following evidence as to her motives: "I dismissed them because I thought it would offend the defendant to keep her longer; it was in consequence of what he had said. It was not because I believed the words, but because I was afraid that it would offend the defendant to keep her; he was my landlord, and came to complain of the conduct of my lodgers." The plaintiff recovered a verdict, *with which the Court refused to interfere, Parke, J., observing, "It is said that the witness would have turned the [*250] plaintiff away on the defendant's wish to that effect being intimated, although no slanderous words had been used. But it is clear that if the words in question had not been used the plaintiff would not have been dismissed; and it is sufficient for this action to shew that she was turned out in consequence of such words of the defendant. The effect of the evidence may be, that the witness would have turned the plaintiff away if different words had been used, but different words were not used, and she was sent away in consequence of these. In Vicars v. Wilcocks, supposing the point there to have been rightly decided, there were two distinct causes of the special damage; the words used, and an act done by a third person; and the damage might have resulted from either." And Patteson, J., added, "The case is not like Vicars v. Wilcocks, because here the whole cause of the special damage proceeds from the defendant himself; nothing is done by any other persons."

Before quitting this part of our subject, it may be noticed, that in Hurrell v. Ellis,(*g*) it was held, that an action lies by a cabdriver against

(*e*) See 1 Stark. on Slander, 206, note(*x*). That learned author considers Vicars v. Wilcocks inconsistent with the cases in which the special damage has consisted of loss of marriage, where the party, who, by reason of the slander, broke off the marriage, was under a promise to marry; and see Morris v. Langdale, 2 B. & P. 284; Green v. Button, 2 Cr. M. & R. 707, and the note to Vicars v. Wilcocks, 2 Smith's L. C. 300.

(*f*) 1 A. & E. 43.

(*g*) 2 C. B. 295.

his master for wrongfully and unjustly defacing his license as a driver, under the statute 6 & 7 Vict. c. 86(*h*) (which by sect. 21 of that statute the proprietor of every hackney carriage is required to retain in his possession whilst the driver remains in his service,) and which license the defendant had defaced by writing upon it a bad character of the plaintiff as a driver. And it was held, after verdict, to be not necessary to aver that it was maliciously done. But in a previous case,(*i*) Lord Abinger had stated his opinion, that if a servant enter into a service, and bring a written character with him, his master could not be considered to do wrong if he wrote upon it that the person to whose character it related had afterwards been in his service, and was dismissed for ill behaviour.

[*251] FALSE AND FORGED CHARACTERS—STATUTE 32 GEO. 3. C. 56.

If a master knowingly give a false character of a servant *to a person about to hire* him, and the servant afterwards, rob or injure his new master, *he* may, in an action for the deceit, recover from the former master the damages he has sustained in consequence of such false character having been given.(*k*)

Moreover, in such cases a criminal responsibility is sometimes incurred by a person giving a false character. By the statute 32 Geo. 3. c. 56, after reciting that "whereas many false and counterfeit characters of servants have either been given personally, or in writing, by evil disposed persons, being, or pretending to be, the master, mistress, retainer, or superintendent of such servants, or by persons who have actually retained such servants in their respective service, contrary to truth and justice, and to the peace and security of his Majesty's subjects; and whereas the evil herein complained of is not only difficult to be guarded against, but is also of great magnitude, and continually increasing, and no sufficient remedy has hitherto been applied:" it is enacted that, after 1st of July, 1792:—

"If any person or persons shall falsely personate any master or mistress, or the executor, administrator, wife, relation, housekeeper, steward, agent or servant of any such master or mistress, *and*(*l*) shall, either personally or in writing, give any false, forged, or counterfeited character to any person offering him or herself to be hired as a servant into the service of any person or persons, then and in such case, every such person or persons so offending, shall forfeit and undergo the penalty or punishment thereinafter mentioned.

"If any person or persons shall knowingly and willingly pretend, or falsely assert in writing, that any servant has been hired or retained for any period of time whatsoever, or in any station or capacity whatsoever other than that for which, or in which he, she, or they shall have hired

(*h*) For regulating hackney and stage carriages in and near London.

(*i*) Taylor v. Rowan, 7 C. & P. 70; S. C. 1 M. & Rob. 490.

(*k*) See Pasley v. Freeman, 3 T. R. 51; S. C. 2 Smith's L. C. 56, in the note to which will be found a discussion of the interesting question how far legal, without moral, fraud, furnishes a ground for action.

(*l*) Sic.

or retained such servant in his, her, or *their service or employment, or for the service of any other person or persons, that [*252] then, and in either of the said cases such person or persons so offending as aforesaid shall forfeit and undergo the penalty or punishment therein mentioned.

"If any person or persons shall knowingly and wilfully pretend or falsely assert, in writing, that any servant was discharged, or left his, her, or their service at any other time than that at which he or she was discharged, or actually left such service, or that any such servant had not been hired or employed in any person's service, contrary to truth, that then, and in either of the said cases, such person or persons shall forfeit and undergo the penalty or punishment thereinafter mentioned.

"If any person shall offer himself or herself as a servant, asserting or pretending that he or she hath served in any service in which such servant shall not actually have served, or with a false, forged, or counterfeit certificate of his or her character, or shall in anywise add to, or alter, efface or erase any word, date, matter or thing contained in, or referred to, in any certificate given to him or her, by his or her last or former actual master or mistress, or by any other person or persons duly authorized by such master or mistress to give the same, that then, and in either of the said cases, such person or persons shall forfeit and undergo the penalty or punishment thereinafter mentioned.

"If any person or persons, having before been in service, shall when offering to hire himself, herself, or themselves as a servant or servants in any service whatsoever falsely and wilfully pretend not to have been hired or retained in any previous service as a servant, that then and in such case such person or persons shall forfeit and undergo the penalty or punishment thereinafter mentioned.

"If any person or persons shall be convicted of any or either of the offence or offences aforesaid by his, her, or their confession, or by the oath of one or more credible witness or witnesses before two or more justices of the peace for the county, riding, division, city, liberty, town, or place where the offence or offences shall have been committed (which oath such justices are hereby empowered and required to administer,) every such offender or offenders shall forfeit the sum of twenty pounds, one moiety whereof shall be paid to the person or persons on whose *information the party or parties offending shall have been convicted, and the other moiety thereof shall go and be applied for [*253] the use of the poor of the parish wherein the offence shall have been committed; and if the party who shall have been so convicted shall not immediately pay the said sum of twenty pounds so forfeited, together with the sum of ten shillings for the costs and charges attending such conviction, or shall not give notice of appeal and enter into recognizance in the manner thereinafter mentioned and in that behalf provided, such justices shall and may commit every such offender to the house of correction, or some other prison of the county, riding, division, city, liberty, town, or place in which he or she shall have been convicted, there to remain and be kept to hard labour, without bail or mainprize, for any time not exceeding three months nor less than one month, or until he

or she pay the said sum so forfeited, together with such costs and charges as aforesaid."

And by sect. 7, after reciting that "it most frequently happens that no person is present at or privy to the giving of the character of a servant, except the persons by and to whom the same is given," it is enacted "that the informer in any of the cases aforesaid shall be and shall be deemed and taken to be a competent and good witness in law, notwithstanding he shall be entitled to a part of the said penalty where the same shall be levied as aforesaid."

By sect. 8 it is provided, "that if any servant or servants, who shall have been guilty of any of the offences aforesaid, shall before any information has been given or lodged against him, her, or them for such offence discover and inform against any person or persons concerned with him, her, or them in any offence against this act, so as such offender or offenders be convicted of such offence in manner aforesaid, every such servant or servants so discovering and informing shall thereupon be discharged and indemnified of, from, and against all penalties and punishments to which at the time of such information given he, she, or they might be liable by this act for or by reason of such his, her, or their own offence or offences."

By sect. 9, for the more easy and speedy conviction of offenders against this act, it is enacted, "that all justices of the peace before whom any person or persons shall be convicted of any offence against the act shall and may cause the conviction to be drawn up in the following *form of words, or in any other form(*l*) of words to the same effect, as the case shall happen, viz.:— [*254]

"Be it remembered, that on the day of in the year of our Lord A. B. is convicted before us two of his Majesty's justices of the peace for the county (*specifying the offence, and the time and place when and where the same was committed, as the case shall be.*)

"Given under our hands and seals the day and year aforesaid."

And by sect. 10 it is provided, "that if any person shall think himself or herself aggrieved by anything done in pursuance of this act, such person may appeal to the justices of the peace at the next general or quarter sessions of the peace to be held for the county or place wherein the cause of complaint shall have arisen, such appellant entering into a recognizance, with two sufficient sureties in the sum of twenty pounds each, conditioned to try such appeal, and abide the order of and to pay such costs as shall be awarded by such justices at such general or quarter sessions, upon due proof of such notice being given as aforesaid, and of the entering into such recognizance; which said justices shall hear and finally determine the causes and matters of such appeal in a summary way, and award such costs to the parties appealing or appealed against as they, the said justices shall think proper, and the determination of such general or quarter sessions shall be final, binding and conclusive to all intents and purposes; and no conviction or order made

(*l*) See 11 & 12 Vict. c. 43.

concerning any matters aforesaid, or any other proceedings to be had touching the conviction or convictions of any offender or offenders against this act, shall be quashed for want of form, or be removed by certiorari, or any other writ or process whatsoever, into any of his Majesty's Courts of record at Westminster.

*CHAPTER VIII. [*255]

OFFENCES BY SERVANTS AGAINST THEIR MASTERS.

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MURDER OF MASTER BY SERVANT.

Formerly, both by the common law and also by the stat. 25 Edw. 3, st. 5, c. 2, it was petit treason for a servant to kill his master or mistress.(*a*) So much of the stat. 25 Edw. 3, however, as relates to petit treason, was repealed by 9 Geo. 4, c. 31, whereby it is enacted (sect. 2), that every offence which before the 1st of July, *1828, would have amounted to petit treason, shall from that day be deemed [*256] to be murder only and no greater offence, and all persons guilty in respect thereof, whether as principals or accessories, shall be dealt with, indicted, tried, and punished as principals and accessories in murder.(*b*)

ASSAULTS COMMITTED BY SERVANTS ON THEIR MASTERS.

The 21st section of 5 Eliz. c. 4, which provided a special punishment for assaults committed by servants on masters, was repealed by 9 Geo. 4, c. 31, s. 1, and the offence is now punishable in the same way as assaults

(*a*) See 3 Inst. 20; Dalt. Just. ch. 142.
(*b*) See further on this subject, Russ. on Crimes.

committed by other persons.(*c*) By sect. 25 of that act it is enacted, that if any person shall be charged with and convicted of an assault with intent to commit felony, or of any assault committed in pursuance of any conspiracy to raise the rate of wages, the Court may sentence the offender to be imprisoned, with or without hard labour, in common goal or house of correction for any term not exceeding two years, and may also (if it shall so think fit) fine the offender and require him to find sureties for keeping the peace.(*d*)

BURGLARY OF A SERVANT IN HIS MASTER'S HOUSE.

A servant, who lives in his master's house, may be guilty of burglary in that house as well as a stranger, for the opportunity which his situation affords him of committing that crime, aggravates rather than extenu-[*257] ates his guilt.(*e*) Where, therefore, one of the servants *in the house opened his lady's chamber door (which was fastened with a brass bolt), with design to commit a rape, King, C. J. ruled it to be burglary, and the defendant was convicted and transported.(*f*) And where(*g*) a servant, in the night time, opened the street door and let in a robber, and shewed him the sideboard, from whence he took the plate, and then again opened the door and let him out: it was held, at a meeting of all the Judges, to be burglary in the servant as well as the other, and he was afterwards executed.

But in the case of a servant opening a door of his master's house for a felonious purpose, without any plan or conspiracy with other persons to commit a robbery, it seems to have been considered that the question, whether such act will amount to a breaking, must depend upon the point whether the door might have been opened by the servant in the course of his trust and employment. Thus, it is said that if a servant unlatch a door, or turn a key in a door of his master's house, and steal property out of the room, such opening of the door, being within his trust, is not a breaking: but that if a servant break open a door, whether outward or inward, (as a closet, study, or counting-house), and steal goods, such opening, not being within his trust, will amount to a breaking of the house, either within the statutes relating to the breaking of dwelling-houses in the day time, or within the law of burglary.(*h*)

(*c*) See 9 Geo. 4, c. 31, ss. 27, 28, 29. And as to the costs and expenses of indictment under sect. 29, see 14 & 15 Vict. c. 55, s. 3. Justices, however, have no jurisdiction under 9 Geo. 4, c. 31, s. 27, to convict of an assault except upon the complaint of the party aggrieved; Reg. v. Deny, 1 L. M. & P. 230.

(*d*) Justices have a discretion as to admitting to bail persons charged with assault in pursuance of conspiracy to raise wages; 11 & 12 Vict. c. 42, s. 23.

(*e*) See 4 Bl. Comm. 227; Bac. Abr., tit. "Burglary." As to burglary in general, see 1 Russ. on Cr., bk. 4, ch. 1.

(*f*) Rex v. Gray, 1 Str. 481.

(*g*) Cornwall's case, 2 Str. 811; and see 19 St. Tr. 782, note; 1 Hale P. C. 486. Where a servant opened the door and let in a robber for the purpose of catching him, having previously communicated with the police, it was held, that *the robber* could not be convicted of *burglary;* Reg. v. Johnson, Carr. & M. 218.

(*h*) 1 Russ. on Crimes, 794, citing 2 Hale, 354, 352, but the learned editor of the 3rd ed. (Greaves) adds, "sed quære, and see Edmond's case, Hutt. 20; Kel. 67; 1 Hale, 554, where a servant who unlatched the stairfoot door and went with a hatchet to kill his master, was held guilty of burglary."

SERVANTS NEGLIGENTLY SETTING FIRE TO THEIR MASTER'S HOUSE, &c.

By statute 14 Geo. 3, c. 78, s. 84, after reciting that *fires often happen by the negligence(*i*) and carelessness of servants, it [*258] is enacted, That if any menial or other servant or servants, through negligence or carelessness, shall fire or cause to be fired any dwelling-house, or outhouse or houses, or other buildings, whether within the limits of that act, or elsewhere within the kingdom of Great Britain, such servant or servants being thereof lawfully convicted, by the oath of one or more credible witness or witnesses, made before two or more of his Majesty's justices of the peace, shall forfeit and pay the sum of one hundred pounds unto the churchwardens or overseers of such parish where such fire shall happen, to be distributed amongst the sufferers by such fire in such proportions as to the said churchwardens shall seem just; and in case of default or refusal to pay the same immediately after such conviction, the same being lawfully demanded by the said churchwardens, that then and in such case such servant or servants shall, by warrant under the hands and seals of two or more of his Majesty's justices of the peace, be committed to the common gaol or house of correction, as the said justices think fit, for the space of eighteen months, there to be kept to hard labour.(*k*)

SERVANT OR OTHER PERSON STEALING IN A DWELLING-HOUSE TO THE VALUE OF FIVE POUNDS OR MORE.

It is enacted by 7 & 8 Geo. 4, c. 29, s. 12, "that if any person shall steal in any dwelling-house any chattel, *money, or valuable security, to the value in the whole of five pounds or more, every such [*259] offender, being convicted thereof, shall suffer death as a felon."

So much of that section, however, as inflicts the punishment of death is now repealed,(*l*) and the punishment of the offence is provided for by the 7 Wm. 4 & 1 Vict. c. 90, whereby it is enacted, that every person convicted of such an offence "shall be liable to be transported beyond the seas for any term not exceeding fifteen years nor less than ten years, or to be imprisoned for any term not exceeding three years." And(*m*) "in awarding the punishment of imprisonment for any offence punishable under this act, it shall be lawful for the court to direct such imprisonment to be with or without hard labour in the common gaol or house

(*i*) *Wilfully* setting fire to a dwelling-house, any person being therein, is a capital offence; 7 Wm. 4 & 1 Vict. c. 89, s. 2.

(*k*) This "clause raising the same sum whatever the extent of suffering and the number of the sufferers, and inflicting the same penalty to whatever degree the negligence may have been culpable, without any power to lower the fine or shorten the imprisonment, can scarcely be supposed to have undergone much consideration on the part of the legislature." Per Lord Denman, in Filliter v. Phippard, 11 Q. B. 354. The enactment in the text is a *general* law; Richards v. Easto, 15 M. & W. 251; S. C. 3 D. & L. 515; and see Filliter v. Phippard, ubi supra. It is not repealed by the 7 & 8 Vict. c. 84, (which repeals some part of 14 Geo. 3, c. 78). See Schedule (A.) to that act.

(*l*) It was first repealed by 2 & 3 Wm. 4, c. 62, which substituted transportation for life. And the 4 Wm. 4, c. 44, s. 3, added, hard labour, and previous imprisonment. Both these acts, however, are repealed by 7 Wm. 4 & 1 Vict. c. 90.

(*m*) Sect. 3.

of correction, and also to direct that the offender shall be kept in solitary confinement for any portion or portions of such imprisonment, or of such imprisonment with hard labour, not exceeding one month in any one time, and not exceeding three months in any one year, as to the court, in its discretion, shall seem meet."

It is not thought necessary to encumber this work with all the decisions on this statute,(*n*) which does not apply exclusively to servants; though it obviously applies to them as well as other persons. The following decisions, however, having taken place on indictments under this act against servants, could not well be omitted here consistently with the object of this work.

In a case(*o*) which happened soon after the passing of the act of Geo. 4, a shopman was charged with stealing, in a dwelling-house, sixty-eight yards of lace, the property of his master. The prisoner had sent the lace (which was in several distinct pieces) from Abingdon to London in a parcel by the coach, and no one piece of lace was worth five pounds: whereupon his counsel suggested that, in favorem vitæ, it might be taken that the pieces of lace might have been stolen at different [*260] *times; but Bolland, B., said, "I cannot assume that to have been so; we find that the lace is all sent in one parcel, and all brought out of the prosecutor's house at once, and unless you can give some evidence to show that it was stolen at different times, you do not raise your point; but even if you did, I should think it would be of no avail, for on the last Winter Circuit, it appeared that a person at Brighton stole goods in the same way that you wish me to suppose that this person did; for it was shewn that he stole the articles one or two at a time and under value, but that he carried them out of his master's house all together, the articles amounting in all to more than five pounds value; and Mr. Baron Garrow, after much consideration, held, that as the articles were all brought out of the prosecutor's house together, it was a capital offence." The prisoner was found guilty.

Where(*p*) an underbutler was indicted for stealing his master's plate to the value of 18*l.* 5*s.* in his dwelling-house, and found guilty, but the jury recommended him to mercy on the ground that they believed that he

(*n*) See them collected in 1 Russ. on Crimes, book 4, ch. 5.

(*o*) Rex v. Jones, 4 C. & P. 217.

(*p*) Reg. v. Phetheon, 9 C. & P. 552; and see R. v. Wright, 9 C. & P. 554, note, where on a servant, who was indicted for stealing his master's plate, setting up as a defence his intention to replace it, Hullock, B., (Holroyd, J., being present,) left it to the jury to say whether the prisoner took the plate with intent to steal it, or whether he merely took it to raise money on it for a time and then return it, for that in the latter case it was no larceny. To which the learned reporters add the following note, "This decision has given rise to much discussion, in various cases; and much difficulty has been found in applying the doctrine it lays down to the facts of particular transactions. In some instances, where it has appeared clearly that the party only intended to raise money on the property for a temporary purpose, and, at the time of pledging the article, had a reasonable and fair expectation of being able shortly by the receipt of money to take it out of pawn, juries, under the advice of the Judge, have acted upon the doctrine and acquitted. But, in other instances, where they could not discover any reasonable prospect which the party had at the time of pledging of being able soon to redeem the article, they have considered the doctrine as inapplicable, and have convicted. See also Reg. v. Holloway, 2 Carr. & K. 944, post, p. 252, note (s).

intended to replace the property, which it appeared he had pledged, a finding which the prisoner's counsel contended amounted to a verdict of not guilty, Gurney, B., without *expressing any opinion on the point, directed that the prisoner should be tried on another indictment [*261] which had been found against him for stealing a silver saucepan belonging to his master. This also the prisoner had pledged; and his counsel contended that he meant to replace this also. But in summing up, Gurney B., said, "If this doctrine of an intention to redeem property is to prevail, courts of justice will be of very little use. A more glorious doctrine for thieves it would be difficult to discover, but a more injurious doctrine for honest men cannot well be imagined." The jury found the prisoner guilty, and he was transported for fourteen years.

STEALING IN A SHOP, WAREHOUSE, OR COUNTING-HOUSE.

The statute 7 & 8 Geo. 4, c. 29, also enacts, sect. 15, "That if any person shall break and enter any shop, warehouse, or counting-house, and steal therein any chattel, money, or valuable security, every such offender being convicted thereof shall be liable to any of the punishments which the court may award as hereinbefore last mentioned.

The punishment of this offence is now provided for by the statute 7 Wm. 4 & 1 Vict. c. 90, ss. 2, 3.(*q*) Upon this enactment it has been held by Alderson, B.,(*r*) that to come within it "the place must be more than a mere workshop, it must be a shop for the sale of articles. A workshop, such as a carpenter's shop or a blacksmith's shop, would not be within the act."

LARCENY AND EMBEZZLEMENT BY CLERKS AND SERVANTS.

The legal distinction between these two offences is, that the former consists in the felonious taking of property, &c., *out of the possession* of the master, whether that possession be actual or constructive:(*s*) whilst the *latter consists in the receiving property, &c., for or on account [*262] of the master, and fraudulently appropriating it, *before it reaches his possession*, either actual or constructive. Morally and substantially, however, the offence is the same in both cases, and, accordingly, the punishment for both offences is now the same. And since Lord Campbell's recent act for the improvement of the Administration of Criminal justice,(*t*) there is little, if any, practical difference between them; for by

(*q*) Supra, p. 259. (*r*) In Reg. v. Saunders, 9 C. & P. 79.

(*s*) In Reg. v. Holloway, 2 Carr. & K. 946, Parke, B., said, "The definitions of larceny are none of them complete: East's is the most so, but that wants some explanation. His definition is, "the wrongful or fraudulent taking and carrying away by any person of the mere personal goods of another from any place with a felonious intent to convert them to his (the taker's) own use, and make them his own property, without the consent of the owner." This is defective for not stating what the fraudulent taking is, and what the felonious intent is. This may be explained,—that the 'taking' is without any colour of right, and the 'intent,' an intent to deprive the owner permanently of the property. Cases also show that a taking of goods with an intent to return them is not larceny." See Reg. v. Phetheon, 9 C. & P 552, note, ante, p. 260.

(*t*) 14 & 15 Vict. c. 100, s. 13, post, p. 289.

that act, a person indicted for one of those offences may be found guilty of the other. It is, however, still necessary for the convenience of practitioners, to advert to the cases which have been decided upon the distinction above pointed out.

At common law, a servant might be guilty of felony in feloniously taking away the goods of his master, though they were goods under his charge, as a shepherd, butler, &c., and may at this day, for any such offence, be indicted as for a felony at common law; but at common law, if a man had *delivered* goods to his servant to keep or carry for him, and he carried them away animo furandi, it was doubtful whether such servant was guilty of felony, or merely a breach of trust. These doubts gave rise to and are recited in the statute 21 Hen. 8, c. 7, whereby such an offence was made felony.(*u*)

[*263] *Subsequent decisions, however, established that where a party had only the bare charge or custody of the goods or money of another, the legal possession remained in the owner, and the party might be guilty of trespass and larceny in fraudulently converting them to his own use.(*v*) This rule holds universally in the case of servants whose possession of their master's goods *by delivery of their master*, is held to be the possession of the master himself, where the master only intended to part with the *custody* of the goods, and if the servant convert such goods to his own use, it is larceny, whether he had a felonious intent at the time he received them, or conceived such an intention afterwards.(*w*) Thus, in the case of a butler or other servant to whose care a master entrusts his plate or other goods, it has uniformly been held, that such servants are guilty of felony by embezzling such plate or goods, or taking them fraudulently away: and this doctrine is not confined to menial servants only, for it appears both by Hale and Hawkins, that if a shepherd who has the care of sheep, and who, from the nature of his employment, must be constantly in the pastures, take away any part of the flock with intent to steal it, he is guilty of felony, although in both cases the plate is actually delivered to the butler,(*x*) and the sheep to the shepherd, for *the*

(*u*) It is said by Gould, J., in Rex v. Wilkins, 1 Leach C. C. 520, that this statute did not mean to weaken but assist the common law. But it is remarkable that the statute 5 Eliz. c. 10, (which revived and made perpetual the statute 21 Hen. 8,) recites, that it had been repealed by the general words of statute 1 M. Sess. 1, c. 1. That statute of Mary, however, only enacted, that all offences made felony during the reign of Hen. 8, *which were not felony before*, should be repealed. Hence, it would seem, that at the time 5 Eliz. c. 40, was passed, it was considered that servants embezzling goods entrusted to them were not guilty of felony at common law, but only by the statute of Hen. 8. The point, however, is more curious than important, at the present day. The stat. 5 Eliz. was repealed by 7 & 8 Geo. 4, c. 27.

(*v*) Bac. Abr., tit. "Master and Servant," M. 2; Hale's Hist. P. C. 505; 2 East, P. C. c. 16, s. 14, p. 564; 2 Russ. on Crimes, ch. 16, p. 153, 3rd ed., where several cases will be found in support of the rule stated in the text.

(*w*) To incite a servant to steal his master's goods is a misdemeanor, indictable at the sessions, although it be not charged in the indictment that the servant stole the goods, nor that any other act was done except the soliciting and inciting; Rex. v. Higgins, 2 East, 5.

(*x*) In Reg. v. Ashley, 1 Carr. & K. 198, it was held, that plate belonging to a club could not be described as the property of the house steward in an indictment against a member of the club for stealing it.

possession still remains in the master.(*y*) And this law prevails in all *cases where servants have not the absolute dominion over the property, but are only entrusted with the care or custody of it for a particular purpose.(*z*) [*264]

Thus, a foreman and bookkeeper to a mercer, not residing in his master's house, but going there every day to transact business, who received from his master certain bills to send to a correspondent by post in the usual course of business, but instead of sending them all, kept back one for which he obtained cash and absconded with the money, was held rightly convicted of larceny; as the possession of the bill still remained in his master.(*a*) So a carter going away with his master's cart, was holden to have been guilty of felony.(*b*) So, where a tradesman's servant and porter was sent with a package of goods from his master's house, with directions to deliver them to a customer, but by the way opened the package, sold the goods, and pocketed part of the price, all the Judges held this to be felony.(*c*) And so where a corn factor, having purchased a cargo of oats, sent his servant with a barge to receive part of the oats in loose bulk, and the servant ordered some of the oats to be put into sacks, which he afterwards embezzled, the judges held it to be larceny.(*d*) So a servant going off with money given to him by his master to carry to another, and applying it to his own use, was holden guilty of larceny.(*e*)

*And so it is held to be guilty of larceny, for the confidential clerk of a merchant, to take a bill of exchange unindorsed from its proper repository, discount it, and convert the proceeds to his own use; although he had the general management of his master's cash concerns, and authority to get bills discounted.(*f*) [*265]

And where some barilla, which the prosecutors had bought, was weighed out in the presence of their clerk, and delivered to their carter's servant to cart, and he allowed other persons to take away the cart and dispose of the barilla for his benefit jointly with that of the other persons; it was held, that *he*, as well as the other persons, was guilty of larceny at common law.(*g*)

And so a person employed to drive cattle to a particular place, who had no authority to sell the cattle, but did so, and converted the money

(*y*) See per Gould, J., in 1 Leach C. C. 523.

(*z*) Upon this principle it was held, in Rex. v. Wilkins, 1 Leach C. C. 520, that to obtain goods, by false pretences, from the servant of the owner to whom they were delivered for the purpose of being carried to a customer who had purchased them, was a taking from the possession of the master; and so a person taking them with a preconceived design to steal them, was guilty of felony. See Reg. v. Johnson, 21 L. J., N. S., M. C. 32.

(*a*) Paradice's case, 2 East P. C. 565, cited by Gould, J., in 1 Leach, 523. See 2 Russ. on Crimes, 153; and see Rex v. Metcalf, Moo. C. C. 433.

(*b*) Robinson's cases, 2 East. P. C. 565.

(*c*) Bass's case, 2 East P. C. 566; 1 Leach, 251, 524.

(*d*) Spear's case, 2 East P. C. 568. In Rex v. Walsh, 4 Taunt. 276, Heath, J., said, "That case went upon the ground that the corn was in the prosecutor's barges, which was the same thing as if it had been in his granary; and see Abrahat's case, 2 East P. C. 569.

(*e*) Lavender's case, Huntingdon Lent Ass. 1793, twice considered by the Judges, East. T., 1793, and Trin. T., 1793. See 2 Russ. on Crimes, 160. See also Reg. v. Goode, Carr. & M 582; Reg. v. Smith, 1 Carr. & K. 423.

(*f*) Chipchase's case, 2 Leach, 699; 2 East P. C. c. 16, s. 15, p. 567; 2 Russ. on Crimes, 161. (*g*) Rex v. Harding, Russ. & Ry. 125.

to his own use, having had a felonious intent at the time he received charge of the cattle, was held guilty of larceny of the cattle. Thus, where(*h*) the prosecutor saw the prisoner at Bristol Fair, and hired him to drive fifty sheep for him from Bristol to Bradford Fair. This was on a Thursday, and the prisoner, with the sheep, was to meet the prosecutor on the following Sunday evening at the turnpike gate nearest to Bradford. The prisoner had no authority to sell the sheep, but was only to drive them to Bradford, for which he was to receive two shillings and sixpence per day. The prisoner never was a servant of the prosecutor, but had been occasionally employed to drive sheep, and he never had authority to sell. The prisoner never went to Bradford, but sold the sheep, telling the purchaser he had authority to do so. The jury found that the prisoner, *at the time* he received the sheep, *intended* to convert them to his own use, and not to go to Bradford. And he was convicted of felony, which conviction was afterwards held right by the Judges.

So, a servant who receives goods from his master, on the master's account, and wrongfully appropriates them, is not guilty of embezzlement, but of larceny.(*i*)

[*266] *If a servant take his master's property, and hand it over to another as a gift, it is as much a felony as if he sell it or take it to a pawnbroker and pledge it. In a case, therefore, where(*k*) a cook, out of compassion, as she alleged, gave away a bundle containing bread, candles, soap, and butter, done up in one of her master's towels, (altogether not worth eighteen pence,) she was convicted of larceny, and she, as well as the receiver, were sentenced to three months' imprisonment; (having, under the circumstances, been recommended to mercy by the jury who tried them.)

Where a nurserymaid, who was indicted for stealing bank notes, the property of her master, in his dwelling-house, set up as her defence, that she found them in the passage, and not knowing to whom they belonged, kept them to see if they were advertised: it was held, that she ought to have inquired of her master whether they were his or not; and that not

[*267] having done so, but having taken them away from the house, she was guilty of stealing them.(*l*) And it has been *repeatedly

(*h*) Rex v. Stock, 1 Moo. C. C. 87; but see as to drovers generally, Reg. v. Hey, post, p. 269.

(*i*) Reg. v. Hawkins, 1 Den. C. C. 584. It is said by the Court, in Rex v. Whittingham, 2 Leach C. C. 913, that "if a servant received money either *from the master*, or from a third person on his master's account," he was guilty of *embezzlement*; but in Reg. v. Hawkins, Lord Truro said, "The *dictum* in Rex v. Whittingham, must be associated with some facts which do not appear in the report of the case." See, also, Rex v. Metcalf, 1 Moo. C. C. 433, where the prisoner was held properly convicted of larceny for appropriating a cheque which he received from his master to pay to a creditor; Reg. v. Johnson, 21 L. J., N. S., M. C. 32.

(*k*) Reg. v. White, 9 C. & P. 344.

(*l*) Reg. v. Kerr, 8 C. & P. 176; and see Reg. v. Thurborn, 2 Carr. & K. 831; S. C. 1 Den. C. C. 387, where it was held, that if a person finds goods that have been lost, or are reasonably supposed by him to have been lost, and appropriates them with intent to take the entire dominion over them, but reasonably believing that the owner can be found, it is larceny. But if he have no intention of appropriating it *at the time of finding*, the subsequent conception of such an intention would not convert the honest taking into a dishonest one, and so make him a felon by relation; Reg. v. Preston, 21 L. J., N. S., M. C. 41.

held,(*m*) that a servant who clandestinely takes his master's corn is guilty of larceny, although he takes it to give to his master's horses and without any intention of applying it to his own private benefit.

And where a carter, who was allowed by his master a small quantity of hay for the use of the horses on their journey to and from London, took from his master's stables two trusses of hay above the quantity allowed, and put them on the tail of his master's wagon, and afterwards the ostler at a public-house on the road side received them from the carter: it was held, that the carter was guilty of larceny, that the larceny was complete the moment the hay got into the cart animo furandi, and therefore that the ostler was properly indicted for receiving the hay, knowing it to have been stolen; but that if it had been hay allowed for the horses which was stolen, it would have been otherwise.(*n*)

In Reg v. Hall,(*o*) where a servant took his master's goods to his master, and endeavoured to induce him to purchase them, pretending that the goods were sent by a person with whom the master dealt: it was held to be larceny. But in Rex v. Webb,(*p*) it was held(*q*) *not* to *be [*268] larceny for miners employed to bring ore to the surface, and paid by the owners according to the quantity produced, to remove from the heaps of other miners ore produced by other miners and add it to their own, in order to increase their wages, the ore still remaining in the possession of the owners. And upon the authority of that case it was held, in Reg v. Halloway,(*r*) not to be larceny for a workman in the employ of a tanner to take skins from his master's warehouse to the foreman at another part of the premises, pretending that he had done work on them for which he was to be paid, and intending to return the skins to his master after he had been paid for his pretended work; but an attempt to commit the misdemeanor of obtaining money by false pretences.

Where a master parts not only with the *custody* but also with the *pos-*

(*m*) Rex v. Morfit, R. & R. C. C. 307; Reg. v. Handley, Carr. & Marshm. 547; Reg. v. Privett, 2 Carr. & K. 114; S. C. 1 Den. C. C. 193; but see the last report of the last case, where it is said, that although all the Judges agreed that they were bound by previous decisions to hold it to be larceny, several of them expressed a *doubt* if they should have so decided if the matter were *res integra*.

(*n*) Reg. v. Gruneell, 9 C. & P. 365.

(*o*) Reg. v. Hall, 2 Carr. & K. 947; S. C. 1 Den. C. C. 381; S. C. 3 New Sess. Cas. 407.

(*p*) Moo. C. C. 431. This offence would be larceny now in the county of Cornwall. See 2 & 3 Vict. c. 58, s. 10, whereby, "for the prosecution and punishment of frauds in mines by idle and dishonest workmen removing or concealing ore for the purpose of obtaining more wages than are of right due to them, and thereby defrauding the adventurers in or proprietors of such mines, or the honest and industrious workmen therein:" it is enacted, "that if any person or persons employed in or about any mine within the county of Cornwall, shall take, remove, or conceal the ore of any metal, or any lapis calaminaris, manganese, mundick, or other mineral found or being in such mine, with intent to defraud the proprietor or proprietors of or adventurer or adventurers in such mine or any one or more of them respectively, or any workman or miner employed therein, then and in every such case respectively such person or persons so offending shall be deemed and taken to be guilty of felony, and being convicted thereof shall be liable to be punished in the same manner as in the case of simple larceny." Reg. v. Trevenner, 2 M. & Rob. 476.

(*q*) Patteson, J., dissentiente.

(*r*) 2 Carr. & K. 944; S. C. 1 Den. C. C. 370; S. C. 3 New Sess. Cas. 410; and Reg. v. Hall, ante p. 267.

session of goods to a servant, and the servant converts them to his own use, it is not larceny, unless he had a felonious intent *at the time* he received them. And, therefore, in the case of drovers(*s*) and other servants entrusted with goods with authority to sell and receive the purchase-money, if such servants sell and embezzle the money, the offence will not be larceny, unless the servant had a felonious intent when he took possession of the goods.(*t*)

Therefore, where(*u*) a person sent some pigs by the prisoner to a lady to be looked at, but he sold the pigs and did not take them to her, Alderson, B., left it to the jury to say whether the prisoner had a felonious intent from the commencement of the transaction, and whether he received the pigs as bailee to deal with them, or only as a servant having the custody of them, and whose duty it was to bring them back. "If," said his lordship, "the prosecutor meant that the prisoner should leave the pigs with the lady, and either bring back the money or make a bargain for the sale of them, then he will be in the situation of a bailee. The question is, whether they were delivered to the prisoner simply that he should *shew them to the lady and bring them back bodily; if [*269] they were, then if the felonious intent came upon him at that time, it would come upon him at the time when he had only the custody and not the possession, and in that case he would be guilty of stealing them."

But it has been recently held,(*v*) that a *drover by trade*, who was employed to drive pigs to a particular place, was paid by the day, and by the custom of the trade had a right to drive other persons' cattle also, but who sold the pigs and absconded with the money, could not be convicted of larceny as a servant, as he was a mere bailee, and not a servant, and had no original intention of stealing the pigs. In that case the prisoner was convicted; but the question having been reserved for the opinion of the Judges, the conviction was held improper. In giving judgment in that case, Parke, B., said, "The question is whether, on the facts stated in this case, the prisoner received the custody of the pigs as a servant of the prosecutor, or as a bailee; in the latter case, he could not be guilty of larceny unless he had intended to appropriate them to his own use at the time of the receipt, which was not the case; in the former, he would be guilty of larceny according to the finding of the jury,—as to which they were properly directed by the learned assistant barrister. There are several reported cases bearing upon the question whether a person is a mere servant or bailee. There are none precisely like the present, though the case of Rex v. Bernard McNamee(*w*) nearly approaches it.

(*s*) Reg. v. Goodbody, 8 C. & P. 665.

(*t*) And see Reg v. Evans, Carr. & M. 632; Reg. v. Glass, 2 Carr. & K. 395; Rex v. Stock, supra p. 265.

(*u*) Reg. v. Harvey, 9 C. & P. 353; and see Reg. v. Evans, Carr. & M. 632; but see Reg. v. Jones, Carr. & M. 611.

(*v*) Reg. v. Hay, 2 Carr. & K. 983; S. C. 1 Den. C. C. 602.

(*w*) 1 Moo. C. C. 361. In that case a general drover, who had been employed by the prosecutor off and on for nearly five years, but not as a regular servant, and was employed to take some sheep to G. Fair, being paid three shillings a day, sold the sheep entrusted to him without having authority to do so, and pocketed the money; and he

In this case, on the one hand, the circumstance that the prisoner was paid the expenses of the cattle, and also that the customary mode of his remuneration was by the day, tend to shew that he was a mere servant; on the other the fact of his being a drover by trade, and also of his *having the liberty to drive the cattle of any other person by the general [*270] usage with respect to drovers, raises an inference that he was not a servant. The learned assistant barrister felt himself bound by the decision of the Judges in the case of Reg. v. Hughes;(x) but that case was under the statute 7 & 8 Geo. 4, c. 29, s. 47, which makes embezzlement by a servant, or person employed in the capacity of a servant to receive money, felony; and the learned Recorder of London referred the question to the Judges, whether the prisoner fell under either description, though if the indictment had been referred to, it was necessary to prove that he was a servant. The Judges decided that the prisoner was properly convicted, and consequently that he was a servant, or person employed in that capacity, and authorized as such to receive money, so that his receipt would be a discharge to the debtor. This is almost exactly the same question; it is whether the prisoner had the custody of the cattle as a servant to the prosecutor at the time of the receipt of them, and we think he could not be so considered, unless in driving the cattle to market he was his servant, and the prosecutor responsible for any negligent act of his in so driving them. This subject has undergone much discussion of late, and has been placed on its proper footing by the case of Quarman v. Burnett,(y) and other cases, one of which is that of a general drover, who was held, in the case of Milligan v. Wedge,(z) not to be a servant so as to make the owner of the cattle responsible for his negligence. After the full consideration which this subject has undergone, we doubt whether the case of Rex v. Bernard McNamee, above referred to, would now be decided in the same way. Upon the whole, we think it was not proved in this case that the prisoner was a mere servant, and the conviction was improper."

By the statute 14 & 15 Vict. c. 100, s. 16, it is enacted, That it shall be lawful to insert several counts in the same indictment against the same person, for any number of distinct acts of stealing, not exceeding three, which may have been committed by him against the same person within the space of six calendar months from the first to the last of such acts, and to proceed thereon for all or any of them.

*And by sect. 17; That if, upon the trial of any indictment for larceny, it shall appear that the property alleged in such in- [*271] dictment to have been stolen at one time, was taken at different times, the prosecutor shall not, by reason thereof, be required to elect upon which taking he will proceed, unless it shall appear that there were more than three takings, or that more than the space of six calendar months elapsed between the first and the last of such takings; and either of such last mentioned cases the prosecutor shall be required to

was held properly convicted of felony, as he had merely the custody of the sheep, and his possession was his master's; and he had no intention of stealing the sheep at the time he received them; and see Rex v. Jackson, 2 Moo. C. C. 32.

(x) 1 Moo. C. C. 370. (y) 6 M. & W. 499. See this case, ante, p. 165.

(z) 12 A. & E. 737. See this case, ante, p. 166.

elect to proceed for such number of takings, not exceeding three, as appear to have taken place within the period of six calendar months from the first to the last of such takings.

By sect. 18; In every indictment in which it shall be necessary to make any averment as to any money or any note of the Bank of England, or any other bank, it shall be sufficient to describe such money or bank note simply as money, without specifying any particular coin or bank note, and such allegation, so far as regards the description of the property, shall be sustained by proof of any amount of coin or of any bank note, although the particular species of coin of which such amount was composed, or the particular nature of the bank note, shall not be proved; and cases of such embezzlement and obtaining money or bank notes under false pretences, by proof that the offender embezzled or obtained any piece of coin or bank note, or any portion of the value thereof, although such piece of coin or bank note may have been delivered to him in order that some part of the value thereof should be returned to the party delivering the same, or to any other person, and such part shall have been returned accordingly.

Various statutes have at different times been passed, with a view to the prevention of the crime of larceny by servants, by the subjection of such persons to a heavier punishment than awaits ordinary offenders. These statutes were, however, all repealed by 7 & 8 Geo. 4, c. 27, and at the same time the law upon the subject was consolidated in the 7 & 8 Geo. 4, c. 29.

By sect. 46 of that statute, "for the punishment of depredations committed by clerks and servants in cases not punishable capitally," it is enacted, that "if any clerk or servant shall steal any chattel, money, or valuable security, belonging to or in the possession or power of his mas-[*272] ter, every such offender being convicted *thereof shall be liable, at the discretion of the Court, to be transported beyond the seas for any term not exceeding fourteen years nor less than seven years, or to be imprisoned for any term not exceeding three years, and, if a male, to be once, twice, or thrice publicly or privately whipped (if the court shall so think fit,) in addition to such imprisonment."(*a*)

In order to convict a person of the aggravated offence of larceny *as a servant*, and subject him to the increased punishment provided by this act, it is of course not necessary that he should be a servant. We shall hereafter, whilst treating of the following section—relating to embezzlement by servants, place before the reader the various decisions upon this point. But it may be here mentioned, that it has been held, that the driver of a glass coach, hired for the day, is not the servant of the party hiring it within the meaning of this act.(*b*) And a doubt has been expressed by Coleridge, J., whether this section extends to public

(*a*) By sect. 4, the court may order hard labour and solitary confinement. As to the latter see 7 Wm. 4 & 1 Vict. c. 90, s. 5. It would seem that the power of the Court to award the common law punishment of fine and imprisonment is not taken away, but added to, by this act of Geo. 4. See Rex v. Johnson, 3 M. & S. 540. As to principals in the second degree and accessories before and after the fact, see 7 & 8 Geo. 4, c. 29, s. 61.

(*b*) Rex v. Hadon, 7 C. & P. 445.

servants under the Crown.(*c*) The case of such persons is provided for by the statute 2 Wm. 4, c. 4.(*d*)

Where, however, the money or other property had *never been in the possession* of the master, it was held that the servant was not guilty of *larceny* in misappropriating it. Thus, where(*e*) a shopman sold goods in the shop, and pocketed the price instead of putting it into the till: it was held, that he could not be convicted of larceny of the money, as it had never been in his *master's possession. The same law was laid down in a case,(*f*) where a banker's clerk pocketed a [*273] hundred pound note instead of putting it into his master's drawer. These decisions gave rise to the first statute against embezzlement, 39 Geo. 3, c. 85. That statute is now repealed: and the punishment of such offences is provided for by 7 & 8 Geo. 4, c. 29, the provisions of which will be stated presently. However, since the passing of that statute, it has been held, that if the master *has had possession* of property, either by his own hands or by the hands of his clerk or servant, a servant cannot be guilty of *embezzling* it, but if he purloin it, it will be *larceny*. Thus where(*g*) a clerk in the employ of A., received from another clerk three pounds of A.'s money to pay for an advertisement, for which he only paid ten shillings, but charged A. twenty shillings, pocketing the difference, all the judges held that he was not properly convicted of embezzlement under 7 & 8 Geo. 4, c. 29, s. 47.

But if such property is merely in the course of passing to the master, and has *not arrived into his possession*, although in the hands of a clerk, if that clerk misappropriate it, he will be guilty of embezzlement. Thus, where(*h*) it was the duty of A.'s clerk to receive money on account of A., and pay it over to A.'s superintendent, whose duty it was to pay it over to the prisoner, whose duty it was to pay it over to A.'s cashier, these persons being all servants of A.; the prisoner having received money in this way and embezzled it, was held to be properly convicted of embezzlement under 7 & 8 Geo. 4, c. 29, s. 47.

And if the property has *once completely arrived* into the master's possession (although merely constructively by the hands of the thief,) and be then misappropriated, the offence will be larceny. Thus in Reg. v. Watts,(*i*) the prisoner was a clerk in the Globe Insurance Office, and it was his duty to receive from the messenger the bankers' passbook, together with the vouchers, to compare the entries in the passbook with the entries in the books of the company, and to preserve the vouchers for *the use of the company. One day the prisoner fraudulently [*274] destroyed a cheque for 1400*l.*, which was delivered to him with

(*c*) Rex v. Lovell, 2 M. R. 236. (*d*) Post.

(*e*) Bull's case, cited 2 Leach, C. C. 841. Upon the authority of this case it was held in Rex v. Headge, Russ. & Ry. 160, that a servant under similar circumstances was properly indicted for embezzlement under the stat. 39 Geo. 3, c. 85; and see Waite's case, 1 Leach, C. C. 28, the case of a clerk in the Bank of England purloining a bond, which gave rise to the stat. 15 Geo. 2, c. 13.

(*f*) Bazeley's case, 2 Leach, C. C. 835.

(*g*) Rex v. Murray, 1 Moo. C. C. 276; S. C. 5 C. & P. 145, note.

(*h*) Reg. v. Masters, 2 Carr. & K. 930; S. C. 1 Den. C. C. 332; S. C. 3 New Sess. Cas. 326.

(*i*) 2 Den. C. C. 14.

the passbook in the usual way, and altered the passbook, having in fact, paid the amount into his own private bankers: and he was held to have been properly convicted of *stealing* the cheque from his masters, as his possession of it was the possession of his master. "The paper in question," said Lord Truro, "as soon as it had passed from the hands of the messenger and arrived at the ultimate destination—the custody of the prisoner for the directors, was really in their possession, and when he afterwards abstracted it for a fraudulent purpose, he was guilty of stealing it from them, as a butler, who has the keeping of his master's plate, would be guilty of larceny, if he should receive plate from the silversmith for his master at his master's house, and afterwards fraudulently convert it to his own use before it had, in any other way than by his act of receiving, come into the actual possession of the master.

"This case is distinguishable from those in which the goods have only been in the course of passing towards the master, as in Reg. v. Masters,(*k*) where the prisoner's duty was only to receive the money from one fellow-servant and pass it on to another, who was the ultimate accountant to the master. Here the paper had reached its ultimate destination when it came to the prisoner's keeping, and that keeping being for his masters, made his possession theirs."

Where a man sent his servant to fetch home some straw which he had bought, and the servant brought it home, took it into his master's courtyard, and put it down at the stable door, which was locked, and afterwards, on the door being opened, put part of the straw into the hayloft, but took the rest away again, and sold it, Tindal, C. J., held that the putting it down at the stable door was a delivery of it to the master, and that the servant could not be convicted of embezzlement: he was found guilty of larceny.(*l*)

By sect. 47 of the statute 7 & 8 Geo. 4, c. 29, "for the punishment of embezzlements committed by clerks and servants, it is declared and enacted, that if any clerk or servant, or any person employed for the purpose or in the capacity of a clerk or servant,(*m*) shall, by virtue of [*275] *such employment, receive or take into his possession any chattel, money, or valuable security, for or in the name or on the account of his master, and shall fraudulently embezzle the same or any part thereof, every such offender shall be deemed to have feloniously stolen the same from his master, although such chattel, money, or valuable security was not received into the possession of such master, otherwise than by the actual possession of his clerk, servant, or other person so employed, and every such offender being convicted thereof shall be liable at the discretion of the court, to any of the punishments which the Court may award, as hereinbefore last mentioned.(*n*)

(*k*) Ante, p. 273.

(*l*) Rex v. Hayward, 1 Carr. & K. 518.

(*m*) In the stat. 39 Geo. 3, c. 85, the words "to any person or persons whomsoever, or to any body corporate or politic," are added.

(*n*) In sect. 46, ante, p. 271. As to principals in the second degree and accessories before and after the fact, see sect. 61.

In order to constitute an offence within the above section (47), three things must concur.(*o*)

1. The prisoner must be a clerk or servant, or employed for the purpose or in the capacity of a clerk or servant.
2. He must, by virtue of such employment, receive or take into his possession some chattel, money, or valuable security, for or in the name or on account of his master.
3. He must fraudulently embezzle the same, or some part thereof.

It will be convenient to consider these three heads separately. Many of the decisions which will be mentioned took place under the old statute. 39 Geo. 3, c. 85, but they may with propriety be inserted here.

1. The prisoner must be a clerk or servant, or employed for the purpose, or in the capacity of, a clerk or servant.

It was the opinion of all the Judges, that an apprentice,(*p*) and also a female servant,(*q*) were within the statute 39 Geo. 3, c. 85. And it is clear that a female servant is within the statute of Geo. 4,(*r*) which "there *can be no doubt would also be held to embrace persons *employed* in the capacity of clerks or servants to corporations"(*s*) [*276] though not appointed under the common seal.(*t*)

A person employed by the overseers of their township as their accountant and treasurer, and who received and paid all moneys receivable or payable on their account, was held to be a clerk and servant within 39 Geo. 3, c. 85,(*u*) and the treasurer to the guardians of the poor of Birmingham, appointed under the statute 1 & 2 Wm. 4, c. lxvii, (local and personal,) is a servant of the guardians within the meaning of the statute 7 & 8 Geo. 4, c. 29, and as such indictable for embezzlement.(*v*)

In Rex v. Hughes(*w*) it was held, that a person employed by a farmer *on one occasion* as a drover in Smithfield, to drive some cattle home to the purchaser, and receive the price, was a servant within the meaning of the act of Geo. 4. Drovers in general, who exercise a distinct calling, would not, however, now be considered as servants under that act.(*x*)

It has been held,(*y*) that the clerk of a savings bank was properly described in an indictment for embezzlement under the statute of Geo. 4,

(*o*) And see per Lord Ellenborough, in Rex v. Johnson, 3 M. & S. 548, 549, on the old stat. 39 Geo. 3, c. 85.

(*p*) Rex v. Mellish, Russ. & Ry. 80. (*q*) Rex v. Smith, Russ. & Ry. 267.

(*r*) See 7 & 8 Geo. 4, c. 28, s. 14.

(*s*) Per Vaughan, J., in Williams v. Stott, 1 C. R. & M. 689. See the remark made upon this dictum of Vaughan, J., in Greaves's ed. of Russ. on Crimes, vol. 2, p. 169, note (*g*). The learned editor, however, appears when he wrote that note to have forgotten the difference between the wording of the stat. Geo. 3, and that of Geo. 4. The interpretation put upon the word "person" by 7 & 8 Geo. 4, c. 28, s. 14, would seem hardly applicable to 7 & 8 Geo. 4, c. 29, s. 47, unless the "person" were a servant.

(*t*) Rex v. Beacall, 1 C. & P. 457.

(*u*) Rex v. Squire, Russ & Ry. 349; S. C. 2 Stark. 349.

(*v*) Reg v. Welch, 2 Carr. & K. 296; S. C. 1 Den. C. C. 199; but see Rex v. Townsend, 2 Carr. & K. 166, post, p. 278, where a person appointed and paid by the *guardians* to assist *overseers* in collecting poor rate, was held not within the act.

(*w*) Rex v. Hughes, 1 Moo. C. C. 370.

(*x*) See Rex v. Goodbody, 8 C. & P. 665; Reg. v. Hey, 2 Carr. & K. 983; S. C. 1 Den. C. C. 602, ante, p. 269.

(*y*) Rex v. Jenson, 1 Moo. C. C. 434; and see Rex v. Hall, 1 Moo. C. C. 474; Reg. v. Callaghan, 8 C. & P. 154.

as clerk to the trustees, although he was elected every year by ballot at a meeting of the managers.

[*277] *A clerk to a joint stock banking company, established under 7 Geo. 4, c. 46, may be convicted of embezzling the money of the company, although he is a shareholder or partner in such company.(z)

And it was held that a person occasionally employed;(a) and a person employed upon commission to travel for orders and to collect debts, although employed by many different houses on each journey, and although he paid his own expenses out of his commission, and did not live with any of his employers, nor act in any of their counting-houses;(b) were servants within the statute of Geo. 3. So, as we have seen, a person employed to carry out coals and sell them, and who was allowed a portion of the profits for his remuneration, was held, by a majority of the Judges, to be a servant within the meaning of the statute of Geo. 3, although it was contended that he was a partner.(c) And a servant, who manufactured an article from materials, the property of his master, for a customer, and, who, having received the price, embezzled the whole of it, was held to be within the act, although, by the agreement between him and his master, he was to have, at the week's end, a proportion of the price for his work.(d)

And it has been held,(e) that a person employed by the overseers to collect the poor rate, was properly described as the servant of the overseers, without mentioning *the churchwardens; and he having [*278] embezzled a rate collected from B., was held properly convicted under the statute of Geo. 4.

But where, under an order of the Poor Law Commissioners, founded on the 46th section of the statute 4 & 5 Wm. 4, c. 76, the board of guardians, of the Preston Union, appointed A. an assistant overseer of a district in the union, of which the township of Farrington formed a part, and A.'s duty was to assist the overseers of each of the townships of the district, and his salary was paid by the guardians: it was held that A. having received money for poor rate from the rate payers of the township of F., which he ought to have paid over to the bankers of the overseers of that township, but which he embezzled, could not be indicted for embezzling this money, as the money of the overseers, as he was not their servant, nor could he be indicted for this embezzlement, as the servant of the guardians, because (if he was their servant,) it was not their money.(f)

(z) Reg. v. Atkinson, Carr. & M. 525; and see Reg. v. Watts, 2 Den. C. C. 14, ante, p. 273, where a clerk, who was also a shareholder in an insurance office, was convicted of embezzlement.

(a) Rex v. Spencer, Russ & Ry. 299; and see Rex v. Metcalf, 1 Moo. C. C. 433; but see Rex v. Freeman, 5 C. & P. 534, contra.

(b) Rex v. Carr, Russ. & Ry. 198; and see Rex v. Leech, 3 Stark. 70; but see what is said by Parke, B., in Reg. v. Goodbody, 8 C. & P. 667, as to a man being the servant of several persons at the same time. In Reg. v. White, 8 C. & P. 742, the driver of a coach, who was employed by one of the proprietors, was held to be his servant; and see Reg. v. Batty, 2 Moo. C. C. 257.

(c) Rex v. Hartley, Russ. & Ry. 139, and cases cited, ante, p. 33.

(d) Rex v. Huggins, Russ. & Ry. 145.

(e) Reg. v. Adey, 1 Den. C. C. 571; and see Rex v. Ward, Gow N. P. R. 168, the case of an extra collector of poor rates, paid by a per centage on his collection, who was held to be a servant within 39 Geo. 3, c. 85.

(f) Reg. v. Townsend, 2 Carr. & K. 186; S. C. 1 Den. C. C. 167.

And it has been held, that the clerk of a chapelry, who was employed to collect the Sacrament money from the communicants, was not the servant of the minister, churchwardens, or poor of the township in which the chapel was situate.(*g*) And that a schoolmaster of a charity school, no part of whose duty it was to receive subscriptions, but who, on one occasion, was requested by the treasurer to receive a sum of 15*l.* on account of the school, did not stand in such a relation to the treasurer or the committee as to bring him within the act.(*h*)

And a person, chosen and sworn in, at a court leet held by a corporation, as chamberlain of certain commonable lands, who received no remuneration, but whose duties were to collect money from the commoners and others using the commonable lands, to employ the money so received in keeping the lands in order, to account at the end of the year to two aldermen of the corporation, and to pay over any balance in his hands to his successor, was held not to be a servant within the meaning of the act.(*i*)

*2. He must, by virtue of such employment, receive or take into his possession some chattel, money, or valuable security for or in the name or on account of his master. [*279]

If a servant, who has no authority to do so, receive money on account of his master, and appropriate it, he will be held not to have received it *by virtue of his employment*, and cannot be convicted of embezzlement. Therefore, where(*k*) a butcher's apprentice, whose duty it was to go round for orders for meat, but who was never employed to collect debts, on one occasion got a customer, on whom he called, to pay him a bill, and pocketed the money: it was held, by all the judges, that he could not be convicted of embezzlement, as it did not appear, by the evidence, that he was ever employed to receive money for his master, or received the money in question by virtue of his employment. And the decision, in that case, was followed in Rex v. Thorley.(*l*) In that case the prisoner was servant of B. and sons, carriers, who had a warehouse at Birmingham; his employment was to look up goods to be carried by his master's wagons, but he had no authority to receive money, all moneys being collected by a collecting clerk. On one occasion, a debtor of B. and sons went into their counting-house, part of the warehouse at Birmingham, to pay a debt, and seeing the prisoner standing at the desk, with some books near him, supposing him to be a clerk authorized to receive money, paid him the money, for which he gave a receipt in the name of B. and sons. The prisoner pocketed the money. But it was held, that as he had no authority to receive it, the case was not within the statute of Geo. 4. And a similar decision was made in Rex v. Hawtin,(*m*) where it was also held, that a servant who, although not authorized to receive money for his

(*g*) Rex v. Burton, 1 Moo. C. C. 237. It does not appear from the report, who had the appointment of the clerk.

(*h*) Rex v. Nettleton, 1 Moo. C. C. 259.

(*i*) Williams v. Stott, 1 Cr. & M. 675; S. C. 3 Tyrwh.

(*k*) Rex v. Mellish, Russ. & Ry. 80.

(*l*) 1 Moo. C. C. 343. Semble, this is the case cited by Alderson, B., as Rex v. Crawley, in Rex v. Hawtin, 7 C. & P. 281. See Barrett v. Deere, Moo. & M. 200, and other cases, ante, p. 127.

(*m*) 7 C. & P. 281, Alderson, B.

master, did so, and pocketed it, could not be convicted of larceny of his master's money, as it had never been in his possession; and not of larceny of the money of the person paying the bill, as *he* had entirely parted with the property of it.

[*280] Upon similar principles it has been held,(*n*) that a *person hired to lead a stallion round the country, for which he was to charge for each mare thirty shillings, and not take less than twenty shillings, could not be convicted of embezzlement, although it was proved that he had not accounted for a sum of six shillings, which was the whole charge he had made on one occasion for covering a mare, as it was his duty to take not less than twenty shillings, and this sum of six shillings was not received by him by virtue of his employment; but contrary to his duty.

So where(*o*) A. was employed only as town traveller and collector to go round and take orders from customers, and enter them in the books, and receive the money for the goods supplied in consequence; but he had no authority whatever to take or direct the delivery of goods from the shop. A customer having ordered two articles of A., he entered only one in the order book, but B., the prosecutor's carman, delivered both to the customer. An invoice was made out by the prosecutor for the first article, amounting to 6*s.* 6*d.*, and B. entered the second article as 4*s.* 6*d.* A. afterwards received from the customer the whole eleven shillings, but only accounted to the prosecutor for 6*s.* 6*d.*: it was held, that this was not embezzlement but larceny, as A. did not receive the 4*s.* 6*d.* for and on account of his master, but contrary to and in breach of his duty towards that master; and A. was acquitted.

But if a person be employed, only on one occasion, to receive money, if, acting at that time in the capacity of a servant, he receive money and misappropriate it, it will be embezzlement. Thus, where(*p*) a person [*281] employed by a carrier, was, on one occasion, directed by his employer *to receive a sum of two pounds, which he did receive, but misappropriated, he was held rightly convicted of embezzlement.

And where a servant was authorized to receive money from a particular class of customers, but received and appropriated, money from others: it was held, that he might be convicted of embezzlement.(*q*)

And so(*r*) a clerk who was employed as evening collector to a carcass butcher, in which capacity it was his duty to receive every evening from the porters employed in the business such moneys as they received from customers in the course of the day, and pay the amount over to M.

(*n*) Rex v. Snowley, 4 C. & P. 390. Of the authority of this case, however, Patteson, J., after consulting Parke, B., expressed great doubts in Reg. v. Aston, 2 Carr. & K. 413. In that case a brewer's drayman, who was authorized to sell porter at 9*s.* 6*d.* a dozen, sold some at 6*s.*, saying he would call again for the money. His master having heard of it, told the purchaser he might pay the drayman when he called. He did so, and the drayman having pocketed the money, was convicted of embezzlement. In that case, however, the master *authorized* the customer to pay the smaller sum to the servant. (*o*) Reg. v. Wilson, C. & P. 27.

(*p*) Spencer's case, Russ. & Ry. 299, ante, p. 277; and see Rex v. Hughes, 1 Moo. C. C. 370, ante, p. 276, and Rex v. Smith, post.

(*q*) Rex v. Williams, 6 C. & P. 626. From that report it does not appear that the prisoner was authorized to receive money at all. But in Rex v. Hawtin, 7 C. & P. 281, Alderson, B., puts the decision on the ground stated in the text.

(*r*) R. v. Beechey, Russ. & Ry. 319; but see Rex v. Thornley, 1 Moo. C. C. 343.

(another clerk,) but who was not expected in the course of his employment to receive money from customers themselves, having called on some debtors of his master and received from them a cheque which he embezzled,—was held to have received it "by virtue of his employment," within the meaning of the act of Geo. 3. And a similar decision was made in the case of a toll collector,(s) who on one occasion was ordered to receive a debt due to his employers, which he received and embezzled, "because though this was out of the ordinary course of the prisoner's employment, yet as he was servant to H. and J., and in his character of servant to them had submitted to be employed by them to receive the note and moneys, and had received them by virtue of his being so employed, the case was within the statute."

If the money misappropriated has been received from the master,(t) or if it has been in his possession,(u) the *servant cannot, as we have seen, be convicted of embezzling it, but should be convicted [*282] of larceny; which, as we shall hereafter see, may now be done, although the prisoner be indicted for embezzlement. In a case,(v) however, where it appeared from the evidence that the prosecutors were spinners, and that the prisoner, who was in their employment, had been from time to time entrusted by them with money for the purpose of paying wages to workpeople; and the duty of the prisoner was to keep an account in a book of the moneys which he so received and disbursed, and the book, when produced, contained three entries made by the prisoner, in each of which he charged his employers with more money than he had paid on their account, and the book had been balanced by the prisoner, but there was no evidence that he had actually accounted with his employers: Wightman, J., stopped an indictment for larceny, observing that perhaps the prisoner never intended to deliver this account, or, if he did, to deliver it with explanations, but *this* was no accounting; and the prisoner was acquitted.

But if a tradesman, suspecting his servant's honesty, give marked money to a friend to purchase something at his shop, and the servant instead of putting the money into the till pocket it, this offence will be embezzlement.(w)

(s) Rex v. Smith, Russ. & Ry. 516. But in Crow's case, 1 Lew. 88, (2 Russ. on Crimes, 178,) which was precisely similar, Parke, B, directed an acquittal, observing that he had never approved of the decision in Rex v. Smith.

(t) Reg. v. Hawkins, 1 Den. C. C. 584, ante, p. 265, note (i); Reg. v. Beaman, Carr. & M. 595, where a servant sent with 6s. to buy coals, pocketed one, and was convicted of larceny; Reg. v. Goode, Carr. & M. 582; and see Reg. v. Johnson, 21 L. J., N. S., M. C. 32.

(u) Rex v. Murray, 1 Moo. C. C. 276, ante, p. 273; and see the case of Reg. v. Masters, and Reg. v. Watts, ante, p. 273.

(v) Reg. v. Butler, 2 Carr. & K. 340. Where a servant, who was employed by her mistress to pay bills, received from her money to pay a bill of a cheesemonger named Sadler, and brought back the bill with the words, "paid Sadler," on it, which she herself had written, having pocketed the money, she was convicted of forgery; Reg. v. Houseman, 8 C. & P. 180.

(w) Rex v. Headge, Russ. & Ry. 160. In that case it is said, "It seems to be the opinion of the Judges that the stat. 39 Geo. 3, c. 85, did not apply to cases which are larceny at common law." In Russ. on Crimes, vol. 2, p. 168, it is said, that the enactment of the stat. 9 Geo. 4, like that of the stat. Geo. 3, has the effect it should seem of constituting the offence described in it a larceny.

Where a servant is sent by his master to get change for a note, gets it, and embezzles the *change*, he is not liable at common law for *stealing that*, but should be indicted for embezzlement, as the master never had possession of *the change*.(*x*)

[*283] *3. He must fraudulently embezzle the same or some part thereof.

Embezzlement may be defined as the fraudulent detention of personal property of any kind belonging to another whilst in the course of passing to the possession of the owner. It is not sufficient, however, in support of a charge of embezzlement, to prove a mere receipt and non-payment over of money; that is a mere matter of account. A positive refusal to account must be shewn.(*y*) Thus, where(*z*) a man gave money to his servant to pay taxes, and the only evidence of embezzlement was that the collector had never received the money: it was held, that the servant could not be convicted of embezzlement. So where(*a*) the clerk to the proprietors of a coach, whose duty it was to receive money for passengers, &c., enter the sums in a book, and remit the money weekly to his employers, duly charged himself in his book with all the sums received, but did not remit the money to his employers as he ought to have done: it was held, that he could not be convicted of embezzlement.

And in Rex v. Jones,(*b*) it was held that a clerk, who had merely *omitted to enter in his book* a sum of money which he had received, could not be convicted of embezzlement, *as it did not appear that he had denied the receipt of it or gave any false account respecting it. [*284]

But if he had rendered *an account in which the sums received were omitted*, that would be evidence of embezzlement.(*c*) And it was held by Coleridge, J.,(*d*) that a baker's servant, whose duty it was on the evening of every day to render an account of all the moneys received during the day for his master, and immediately pay over the amount, having *wilfully omitted* to account, might be convicted of embezzlement,

(*x*) Rex v. Sullens, 1 Moo. C. C. 129. If he steal *the note* it is larceny; Bass's case, ante, p. 264; Rex v. Atkinson, 1 Leach C. C. 302; and see Rex v. Walsh, Russ. & Ry. 215; S. C. 4 Taunt. 258, 2 Leach C. C. 1054; Reg. v. Johnson, 21 L. J., N. S., M. C. 32.

(*y*) In addition to the cases cited in the text in support of this position, the case of Rex v. Taylor, 3 B. & P. 596, may be referred to. In that case it was held, that the offence was completed in the county in which the clerk refused to account: and, accordingly, that he might be indicted and tried in that county, though he received the money in another county. Now he may be indicted in either; 7 Geo. 4, c. 64, s. 12; and see Rex v. Hobson, Russ. & Ry. 56; Reg. v. Murdoch, 21 L. J., N. S., M. C. 22.

(*z*) Rex v. Smith, Russ. & Ry. 267.

(*a*) Rex v. Hodgson, 3 C. & P. 422; but see Reg. v. Jackson, 1 Carr. & K. 384, post; and see Rex v. Hebb, 2 Russ. 1242, where Garrow, B., held, that a clerk could not be convicted of embezzlement from whose books it appeared that he had received more than he had paid away. See also Reg. v. Butler, 2 Carr. & K. 340, ante, p. 282. See, however, Rex v. Grove, post, p. 285.

(*b*) 7 C. & P. 833; and see another case against the same person, 7 C. & P. 834.

(*c*) Reg. v. Creed, 1 Carr. & K. 63. See Reg. v. Butler, 2 Carr. & K. 340, ante, p. 282, a case where a servant had made up his account, but had never delivered it: and it was held no accounting.

(*d*) Reg. v. Jackson, 1 Carr. & K. 384. In Reg. v. Wortley, 21 L. J., N. S., M. C. 44, Lord Campbell said, "there are many authorities which shew that the denial of the receipt of the money by the prisoner constituted an embezzlement."

as such an omission was equivalent to a denial of the receipt of the money. And where(*e*) a female servant was sent to receive rent due to her master, received the rent and went off to Ireland: it was held by the same learned Judge, that the circumstances of her *quitting her place and going off to Ireland* was *evidence* from which a jury might infer that she intended to appropriate the money; and she was found guilty.

But where a servant, having received money, admitted the receipt and *promised to account*, but *did not* do so: it was held by Erskine, J.,(*f*) that he could not be convicted of embezzlement. In that case, the collector of a water company, as was his practice, gave the turncock three receipts for water rate, desiring him to receive the amounts. He received the money, and, when asked, admitted that he had done so, and said he would pay it over on Monday,—but absconded.

And where(*g*) the master of a coal ship retained part of the freight received for carriage of coals, *claiming a right* to do so according to a recognised custom between owners and captains in the course of business: Cresswell, J., held, that he could not be convicted of embezzlement.

In support of an indictment for embezzlement, it is, in general, necessary to prove that some specific sum has been embezzled. But, in one case, that rule appears *to have been relaxed.(*h*) In that case, the prisoner was cashier in a bank. His duty was to take charge [*285] of the cash, and when any payment was made into the bank in money and paper, the course was for him to hand over the paper to a clerk, and to enter the cash received in a book, kept by himself, called "the money book." It was also his duty, at the close of each day, to see that the cash in hand agreed with the "money book," and to strike a balance denoting the sum in cash which he had in his charge, and which ought to have been kept either in a drawer in the counter, of which he had the key, or in a box in the banking house, of which also he had the key. One day, the cash in the money book, at the close of business, was 1762*l.*, which was duly carried forward, and formed the first item in the next day's account. On the latter day, at the close of business, the prisoner made the balance in the money book, 1309*l.*, which amount he ought to have in one or other of the above named places of deposit. Upon examination, however, it was found, that instead of 1309*l.*, the prisoner had only 345*l.*, leaving a deficiency of 964*l.* The prisoner, who admitted that he was short about 900*l.*, was indicted for embezzling "money to a large amount, to wit, 500*l.*" The only witness against the prisoner was the partner in the bank, who discovered the delinquency, and who could not say when the money had been purloined, from what persons it had been received, what sort of money had been abstracted, or whether from the till, or upon the receipt from customers. The jury found the prisoner guilty of embezzlement to the amount charged, and after argument and considerable doubt, eight Judges, against seven, held that there was sufficient evidence to go to the jury of the prisoner having received certain moneys on a particular day,

(*e*) Rex v. Williams, 7 C. & P. 338. (*f*) Reg. v. Creed, 1 Carr. & K. 63.
(*g*) Reg. v. Norman, Carr. & M. 501.
(*h*) Rex v. Grove, 7 C. & P. 635; S. C. 1 Moo. C. C. 447.

and for them to find that he embezzled the sum mentioned in the indictment. However, in a subsequent case,(*i*) where a shopman was indicted for embezzlement, and the counsel for the prosecution offered to prove that there was a deficiency in the prisoner's accounts, but [*286] said that there was no proof of the *embezzlement of any particular sum, and cited Rex v. Grove, Alderson, B., directed an acquittal, saying, that "whatever difference of opinion there might be in the case of Rex v. Grove, proceeded more upon the peculiar facts of that case than upon the law. It is not sufficient to prove, at the trial, a general deficiency in account. Some specific sum must be proved to be embezzled, in like manner, as in larceny, some particular article must be proved to have been stolen." And again, in a case(*k*) where it was the duty of a clerk and traveller to receive money for his employer, pay wages out of it, and make entries of all moneys received and paid in a book, and to enter the weekly totals of receipts and payments in another book, upon which last book he, from time to time, paid over balances to his employer; the clerk having entries in the first book amounting to 25*l.*, entered them in the second as 35*l.*, and two months afterwards, in accounting with his master, made his balance ten pounds too little by these means, and paid it over accordingly; and on this evidence he was indicted for embezzling the ten pounds: Williams, J., asked the counsel for the prosecution "Can you shew any precise sum received by the prisoner, on account of his master, and the whole or part of that very sum appropriated by him to his own use?" and, in the absence of such evidence, directed an acquittal.

Where a clerk received six bank notes, on his master's account, in payment of a particular debt, and made an entry, in his master's book, of a smaller sum as received, but afterwards paid over to his master the *identical notes* which he had received, applying them, in his account, to another debt received by him for his master, he was held to have been rightly convicted of embezzlement in respect of *these six notes*.(*l.*)

It is, however, no objection to an indictment for embezzlement that the master had no right to the money; if it be received by the clerk or servant by virtue of his employment and on account of his master, it will be sufficient.(*m*) And it has been held to be embezzlement in the secre- [*287] tary to a society fraudulently to withhold *money received from a member to be paid over to trustees; and that he might be stated to be the clerk and servant of the trustees, and the money might be stated to be their property, *though the society was not inrolled*, and though the money ought, in the ordinary course, to have been received by a steward.(*n*) However, in another case, where a society, in consequence of administering to its members an unlawful oath, was an unlawful combination and confederacy under the statutes 39 Geo. 3, c. 79, and 57 Geo.

(*i*) Rex v. Jones, 8 C. & P. 284. Of this case it may be remarked, that Alderson, B., was one of the seven dissentient Judges in Rex v. Grove, and in Grove's case there was an admission, which in this case there was not.

(*k*) Reg. v. Chapman, 1 Carr. & K. 119; and see Reg. v. Welch, 2 Carr. & K. 296.

(*l*) Rex v. Hall, 3 Stark. 67; S. C. Russ. & Ry. 463. Such a case as this is not very likely to occur again since 7 & 8 Geo. 4, c. 29, s. 48.

(*m*) Rex v. Beacall, 1 C. & P. 312, 454. (*n*) Reg. v. Hall, 1 Moo. C. C. 474.

3, c. 19, s. 25: it was held, that a person charged with embezzlement as clerk and servant to such society could not be convicted.(*o*)

The receipt of the money by the prisoner cannot be proved by an *unstamped receipt*, where the amount is such as to render a stamp necessary.(*p*)

INDICTMENT.

By 7 & 8 Geo. 4, c. 29, s. 48, for preventing the difficulties that had been experienced in the prosecution of the last mentioned offenders, it is enacted, that it shall be lawful to charge in the indictment and proceed against the offender for any number of distinct acts of embezzlement, not exceeding three, which may have been committed by him against the same master within the space of six calendar months from the first to the last of such acts;(*q*) and in every such indictment, except where the offence shall relate to any chattel, it shall be sufficient to allege the embezzlement to be of money, without specifying any particular coin or valuable security, and such allegation, so far as regards the description of the property, shall be sustained, if the offender shall be proved to have embezzled any amount, although the particular species of coin or valuable security of which such amount was composed shall not be proved, or if he shall be proved to have embezzled any piece of coin or valuable security, or any portion of the value thereof, although such piece of coin or valuable security may have been delivered to him in order that some part of the value thereof should be returned to the party *delivering the same, and such part shall have been returned accordingly. [*288]

The provision was intended to remove considerable difficulties which formerly beset a prosecutor, and often prevented a prosecution under the repealed statute.(*r*) It was found, however, on the other hand, that it frequently caused great hardships to prisoners, who, from the general mode in which indictments are framed under it, could not obtain any satisfactory information as to the specific charges made against them.(*s*) To remedy this evil, it has become the practice for Judges, on motion supported by affidavit,(*t*) to grant an order for particulars, which ought at least to contain the names of the persons from whom the sums of money are alleged to have been received.(*u*)

And it has been held,(*v*) that if a servant be indicted, under this act of Geo. 4, for embezzlement, and the indictment contain only one count

(*o*) Reg. v. Hunt, 8 C. & P. 642.

(*p*) Rex v. Hall, 3 Stark. 67. See Reg. v. Wortley, 21 L J., N. S., M. C. 44.

(*q*) And see 14 & 15 Vict. c. 100, s. 16, ante, p. 270.

(*r*) 2 Russ. on Crimes, 168.

(*s*) It is conceived that this observation applies with two fold force since 14 & 15 Vict. c. 100, s. 13, post.

(*t*) The affidavit should state that the prisoner does not know the charges intended to be brought against him, that it is necessary for his defence to be furnished with the particular charges, and that he has applied to the prosecutor for a particular and been refused. See 2 Russ. on Crimes, 189, note.

(*u*) Rex v. Hodgson, 3 C. & P. 422; Rex v. Bootyman, 5 C. & P. 300.

(*v*) Rex v. Williams, 6 C. & P. 626. See now 14 & 15 Vict. c. 100, s. 17, ante, 271.

charging the receipt of a gross sum on a particular day, if it turn out that the money was received in different sums on different days, the prosecutor must make his election and confine himself to one sum and one day.

In an indictment under this section, it is the safest course to have three separate counts; each of the two last of which should aver that the money was—not only received, but embezzled within six months from the day mentioned in the first count. Where an indictment contained only one count, which charged, that within six months the prisoner *received* three sums, laying a day to the receipt of each, and that "on the several days aforesaid" the prisoner embezzled these sums: it was held bad, because it did not shew that the sums were *embezzled* within six months of each other.(*w*) And where an indictment contained three counts, the first of which was in the usual form, but the second *stated, "that within [*289] six calendar months from the day mentioned in the first count of the indictment," to wit, &c., at, &c., the said N. being then and there employed, &c., did, by virtue of his employment, &c., *receive*, &c., and the said last mentioned money, to wit, *on the day and year last aforesaid*, at, &c., feloniously did *embezzle*, &c.; and the third was in the same form; Cresswell, J. held the second and third counts bad, and confined the prosecutor to evidence on the first count only.(*x*)

By the 14 & 15 Vict. c. 109, s. 13, it is enacted, "That if, upon the trial of any person indicted for embezzlement as a clerk, servant, or person employed for the purpose or in the capacity of a clerk or servant, it shall be proved that he took the property in question in any such manner as to amount in law to larceny, he shall not, by reason thereof, be entitled to be acquitted, but the jury shall be at liberty to return as their verdict, that such person is not guilty of embezzlement, but is guilty of simple larceny, or of larceny as a clerk, servant, or person employed for the purpose or in the capacity of a clerk or servant, as the case may be, and thereupon such person shall be liable to be punished in the same manner as if he had been convicted upon an indictment for such larceny: and if, upon the trial of any person indicted for larceny, it shall be proved that he took the property in question in any such manner as to amount in law to embezzlement, he shall not, by reason thereof, be entitled to be acquitted, but the jury shall be at liberty to return as their verdict, that such person is not guilty of larceny, but is guilty of embezzlement, and thereupon such person shall be liable to be punished in the same manner as if he had been convicted upon an indictment for such embezzlement, and no person so tried for embezzlement or larceny as aforesaid, shall be liable to be afterwards prosecuted upon larceny or embezzlement upon the same facts.

Other acts of parliament have also, at various times been passed, for the protection of masters in trade from frauds and embezzlement of property by their servants. In this place, however, it is unnecessary to do more than refer to those acts, most of which will be found in the Appendix.

(*w*) Reg. v. Purchase, Carr. & M. 617.
(*x*) Reg. v. Noake, 2 Carr. & K. 620.

*OFFENCES COMMITTED BY PERSONS EMPLOYED IN THE PUBLIC SERVICE. [*290]

By stat. 50 Geo. 3, c. 59, s. 2, it is enacted, That if any officer, collector, or receiver, entrusted with the receipt, custody or management of any part of the public revenues, shall knowingly furnish false statements or returns of the sums of money collected by him or entrusted to his care, or of the balances of money in his hands or under his control, such officer, collector, or receiver so offending and being thereof convicted, shall be adjudged guilty of a misdemeanor, and shall be adjudged to suffer the punishment of fine and imprisonment at the discretion of the Court, and be rendered for ever incapable of holding or enjoying any office under the Crown. And by stat. 2 Wm. 4, c. 4, after repealing the first section of 50 Geo. 3, c. 59, it is enacted, (sect. 1,) That if any person employed(*y*) in the public service of his Majesty, and entrusted, by virtue of such employment,(*z*) with the receipt, custody, management, or control of any chattel, or valuable security, shall embezzle the same,(*a*) or any part thereof, or in any manner fraudulently apply or dispose of the same, or any part thereof, to his own use or benefit, or for any purpose whatsoever except for the public service, every such offender shall in England and Ireland be deemed to have stolen the same, and shall in England and Ireland be deemed guilty of felony, and in Scotland of a high crime and offence, and *on being thereof convicted in due form of law, shall be liable, at the discretion of the Court, to be transported beyond [*291] the seas for any term not exceeding fourteen years, nor less than seven years, or to be imprisoned with or without hard labour, as to the Court shall seem meet, for any term not exceeding three years.

Sect. 2. That every tally, order, or other security whatsoever, entitling or evidencing the title of any person or body corporate to any share or interest in any public stock or fund, whether of the United Kingdom, or of Great Britain, or of Ireland, or of any foreign state, or to any share or interest in any fund of any body corporate, company or society, or to any deposit in any savings bank, and every debenture, deed, bond, bill, note, warrant, order, or other security, whatsoever for money, or for payment of money, whether of this kingdom or of any foreign state, and every warrant or order for the delivery or transfer of any goods or valuable thing, shall, throughout this act, be deemed for every purpose to be included under and denoted by the words "valuable security;" and that if any person so employed and entrusted as aforesaid, shall embezzle or fraudulently apply or dispose of any such valuable security as afore-

(*y*) Acting in the employment is sufficient without proof of formal appointment; Rex v. Borrett, 6 C. & P. 124; Reg. v. Townsend, Carr. & M. 178.

(*z*) In Reg. v. Townsend, Carr. & M. 178, it was held, that a Post Office letter carrier who was in the daily habit of calling at the lodge of G. Infirmiry, and there receiving letters, with a penny on each to prepay the postage, and taking them to the G. post office, having embezzled some of the pence thus received might be convicted under this act, as there was evidence to go to the jury that the pence were received by him by virtue of his employment as a letter carrier.

(*a*) It was held to be sufficient in an indictment under this act to state that a clerk embezzled money *received* by him *whilst* such clerk, without any more specific allegation that he *embezzled whilst* clerk; Reg. v. Lovell, 2 Moo. & Rob. 236.

said, he shall be deemed to have stolen the same within the intent and meaning of this act, and shall be punishable thereby in the same manner as if he had stolen any chattel of like value with the share, interest, or deposit to which such security may relate, or with the money due on such security or secured thereby and remaining unsatisfied, or with the value of the goods or other valuable thing mentioned in such security.

Sect. 3 is similar to sect. 48 of 7 & 8 Geo. 4, c. 29; ante, p. 287.

By sect. 4. That in every such case of embezzlement, or fraudulent application, or disposition as aforesaid, of any chattel, money or valuable security, it shall be lawful, in the order of committal, by the justice of the peace before whom the offender shall be charged, and in the indictment to be preferred against such offender, to lay the property of any such chattel, money, or valuable security as aforesaid, in the king's majesty.

And by sect. 5. That every offender against this act may be dealt with, indicted, tried, and punished either in the county or place, in which he shall be apprehended, or in the county or place where he shall have committed the offence.

[*292] *EMBEZZLEMENT, ETC., BY OFFICERS AND SERVANTS OF THE BANK OF ENGLAND.

By statute 15 Geo. 2, c. 13, s. 12, it is enacted, that if any officer or servant of the said company being entrusted with(*b*) any note, bill, dividend, warrant, bond, deed, or any security, money, or other effects(*c*) belonging to the said company, or having any bill, dividend, warrant, bond, deed, or any security or effects of any other person or persons lodged or deposited with the said company, or with him as an officer or servant of the said company shall secrete, imbezil, or run away with any such note, bill, dividend, warrant, bond, deed, security, money, or effects, or any part of them, every officer or servant so offending, and being thereof convicted in due form of law, shall be deemed guilty of felony, and shall suffer [death as a felon without benefit of clergy.]

Provisions, similar to the above, are also contained in 35 Geo. 3, c. 66, s. 6, (whereby certain Irish annuities were transferred to the Bank of England,) and 37 Geo. 3, c. 46, s. 6, (whereby certain other annuities were also transferred to the Bank of England.) The punishment of death, however, for these offences is abolished by 4 & 5 Vict. c. 56, by sect. 1 of which act it is enacted, that persons convicted of offences against the act 15 Geo. 2, c. 13, s. 12, shall be liable, at the discretion of the Court, to be transported beyond the seas for the term of the natural life of such person, or for any term not less than seven years, or to be imprisoned for any time not exceeding three years.

(*b*) A person cannot be convicted under this act who merely *has access to* notes, &c. but is not *entrusted with them;* Bakewell's case, Russ. & Ry., 35; and see Phillips v. Huth, 6 M. & W. 572; Hatfield v. Phillips, 14 M. & W. 665.

(*c*) In Rex v. Aslett, 1 Bos. & P. N. R. 1, it was held that Exchequer bills, signed by a person not authorized to sign them, were effects within the meaning of this act. And it was also held that 39 Geo. 3, c. 85, did not repeal this act.

And by sect. 4, it is also enacted, "That in awarding the punishment of imprisonment for any offence punishable under this act, it shall be lawful for the Court to direct such punishment to be with or without hard labour in the common gaol or house of correction, and also to direct that the offender shall be kept in solitary *confinement for any portion or portions of such imprisonment, whether the same be or with or [*293] without hard labour, not exceeding one month at any one time, and not exceeding three months in any one year, as to the Court in its discretion shall seem meet.

By sect. 6, such offences are not triable before any justices of the peace at any general or quarter sessions of the peace.

EMBEZZLEMENT, ETC., BY OFFICERS AND SERVANTS OF THE BANK OF IRELAND.

The stat. 21 & 22 Geo. 3, c. 16, s. 16, relating to the Bank of Ireland, contains a provision similar to that in the 15th Geo. 2, c. 13, s. 12, relating to the Bank of England; supra, p. 292. And the stat. 5 & 6 Vict. c. 28, ss. 4, 19, contains provisions, regulating the punishment of such offences, exactly similar to those contained in the 4 & 5 Vict. c. 56, ss. 1, 4; supra, p. 292.

EMBEZZLEMENT, ETC., BY OFFICERS AND SERVANTS OF THE SOUTH SEA COMPANY.

The stat. 24 Geo. 2, c. 11, s. 3, contains a provision similar to that in the 15 Geo. 2, c. 13, s. 12, relating to the Bank of England; supra, p. 292. The punishment of these offences is now regulated by the stat. 4 & 5 Vict. c. 56, ss. 1, 4; supra, p. 292.

EMBEZZLEMENT, ETC., BY OFFICERS AND SERVANTS IN THE CUSTOMS AND EXCISE.

By the act for the Warehousing of Goods, 8 & 9 Vict. c. 91, s. 47, it is enacted, "that in case it shall at any time happen that any embezzlement, waste, spoil, or destruction shall be made of or in any goods or merchandize which shall be warehoused in warehouses under the authority of this act, by or through any wilful misconduct of any officer or officers of Customs(*d*) or Excise,(*e*) such officer or officers shall be deemed guilty *of a misdemeanor, and shall, upon conviction, suffer such [*294] punishment as may be inflicted by law in cases of misdemeanor; and if such officer shall be so prosecuted to conviction by the importer, consignee, or proprietor of the goods or merchandize so embezzled, wasted, spoiled, or destroyed, then and in such case no duty of Customs or Excise shall be payable for or in respect of such goods or merchandize so

(*d*) As to who is an officer of customs, see 8 & 9 Vict. c. 85, s. 7.

(*e*) Proof of *acting* as an officer of excise would be sufficient, without proving his appointment. See 7 & 8 Geo. 4, c. 53, s. 17.

embezzled, wasted, spoiled, or destroyed, and no forfeiture or seizure shall take place of any goods and merchandize so warehoused, in respect of any deficiency caused by such embezzlement, waste, spoil, or destruction; and the damage occasioned by such embezzlement, waste, spoil, or destruction of such goods or merchandize (not being occasioned by fire,) shall be repaid and made good to such importer, consignee, or proprietor by the Commissioner of Customs or Excise, under such orders, regulations, and directions as shall be for that purpose made and given by the Commissioners of her Majesty's Treasury, or any three of them."

OFFENCES BY OFFICERS AND SERVANTS EMPLOYED BY OR UNDER THE POST OFFICE.(1)

By the stat. 7 Wm. 4 & 1 Vict. c. 36, which consolidated the law relating to the Post Office, it is enacted, (sect. 25,) That every person employed by or under the Post Office, who shall, contrary to his duty, open or procure or suffer to be opened a post letter, or shall wilfully detain or delay, or procure or suffer to be detained or delayed a post letter, shall in England and Ireland be guilty of a misdemeanor, and in Scotland of a crime and offence, and, being convicted thereof, shall suffer such punishment by fine or imprisonment, or by both, as to the Court shall seem meet: provided, always, that nothing herein contained shall extend to the opening or detaining or delaying of a post letter returned for want of a true direction, or of a post letter returned by reason that the person to whom the same shall be directed is dead, or cannot be found, or shall have refused the same, or shall have refused or neglected to pay the postage thereof, nor to the opening or detaining *or delaying of a post [*295] letter in obedience to an express warrant in writing under the hand (in Great Britain) of one of the principal Secretaries of State, and in Ireland under the hand and seal of the Lord Lieutenant of Ireland.

Sect. 26. That every person employed under the Post Office, who shall steal, or shall, for any purpose whatever, embezzle, secrete,(*f*) or destroy a post letter, shall in England and Ireland be guilty of felony, and in Scotland of a high crime and offence, and shall, at the discretion of the Court, either be transported beyond the seas for the term of seven years, or be imprisoned for any term not exceeding three years, and if any such post letter so stolen or embezzled, secreted or destroyed shall contain therein any chattel or money whatsoever, or any valuable security, every such offender shall be transported beyond the seas for life.

By sect. 32. For the Protection of Printed Votes and Proceedings in

(*f*) In an indictment for secreting a letter, it is not necessary to state the purpose for which the letter was secreted; Reg. v. Wynn, 2 Carr. & K. 859. In that case a person employed in the Post Office committed a mistake in the sorting of two letters containing money, and to avoid a supposed penalty attached to such a mistake, he threw the letters unopened and the money down a watercloset: held, by all the Judges, that there was a larceny of the letters and money; and also a "secreting" of the letters within this statute.

(1) See Wharton's Criminal Law, p. 768, for statutes and authorities, 2d ed. 1852.

Parliament and Printed Newspapers sent by the Post, it is enacted, That every person employed in the Post Office who shall steal, or shall for any purpose embezzle, secrete,(*g*) or destroy, or shall wilfully detain or delay in course of conveyance or delivery thereof by the post, any printed votes or proceedings in parliament, or any printed newspaper, or any other printed paper whatsoever, sent by the post without covers or in covers open at the sides, shall in England and Ireland be guilty of a misdemeanor, and in Scotland of a crime and offence, and, being convicted thereof, shall suffer such punishment by fine or imprisonment, or by both, as to the Court shall seem meet.

Since the passing of this act of Parliament, which contains no provision for the punishment of embezzlement of moneys received for postage, it is usual(*h*) to *indict and proceed against persons in the employ of the Post Office, who commit that offence, under the provisions of the 2 Wm. 4, c. 4; ante p. 290. [*296]

To convict a person under 7 Wm. 4 & 1 Vict. c. 36. evidence of acting in the employ of the Post Office would be sufficient evidence of such employment, without proof of any formal appointment,(*i*) though, in an Irish case, it was held, that some proof of acting with the *sanction* of the Post Office authorities was necessary.(*k*) Moreover, the prisoner must have been a servant in the employ of the Post Office when he committed the offence imputed to him.(*l*) And therefore it was held, under the old Post Office Act, 52 Geo. 3, c. 143, that a servant employed at a receiving-house to clean boots, &c., and who used to assist in tying up and sealing the post office bag, was not a servant of the Post Office.(*m*)

But a man employed by the postmistress to carry letters from one place to another at a weekly salary, paid to him by the postmistress, but which was repaid to her by the Post Office, was held to be a person employed by the Post Office within that act.(*n*) And now, by the interpretation clause of 7 Wm. 4 & 1 Vict. c. 36, s. 47, the expression "persons employed by or under the Post Office," shall include every person employed in any business of the Post Office, according to the interpretation given to the expression "officer of the Post Office," and that expression shall include the Postmaster General, and every deputy postmaster, agent, officer, clerk, letter carrier, guard, postboy, rider, or any other person employed in any business of the Post Office, whether employed by the Postmaster General or by any person under him, or on behalf of the Post Office.

By the same section it is enacted, that "the term *post letter* shall mean any letter or packet transmitted by the post under the authority of the Postmaster General, and a letter shall be deemed a post letter from the time of its being delivered to a post office to the time of its being deliver-

(*g*) See Reg. v. Wynn, 2 C. & K. 859, supra.

(*h*) Reg. v. Townsend, Carr. & M, 178, ante p. 290, note (*z*).

(*i*) Rex v. Rees, 6 C. & P. 606; Rex v. Borrett, 6 C. & P. 124; Reg. v. Townsend, Carr. & M. 178.

(*k*) Rex v. Trenwyth, Ir. Circ. Rep. 172, sed qu.

(*l*) But he need not have embezzled it whilst in the employ; Reg. v. Lovell, 2 Moo. & Rob. 236.

(*m*) Rex v. Pearson, 4 C. & P. 572. (*n*) Rex v. Salisbury, 5 C. & P. 155.

[*297] ed to the person to whom *it is addressed, and the delivery to a letter carrier or other person authorized to receive letters for the post, shall be a delivery to the Post Office, and a delivery at the house or office of the person to whom the letter is addressed, or to him, or to his servant, or agent, or other person considered to be authorised to receive the letter according to the usual manner of delivering that person's letters, shall be a delivery to the person addressed."

Under this act it has been held, that a post letter means a letter put in the ordinary way into the Post Office. And, therefore, where(*o*) a letter carrier was suspected, and, for the purpose of trying his honesty, an assistant inspector of letter carriers inclosed a marked sovereign in a letter addressed to W. M., then sealed the letter and marked it as if it had been put into the post in the regular way as a paid letter, but it never was posted: on the following day, whilst the prisoner was not attending, the letter was put amongst a heap which he had to deliver, and the prisoner was seen to take the letter into his possession, but never delivered it, and the marked sovereign was found in his pocket: it was held, by all the Judges, that he could not be convicted of stealing a "post letter." And a similar decision was made under similar circumstances, where such a letter had an entirely fictitious address.(*p*) In both the above cases, however, the prisoners were convicted of larceny. And, in a subsequent case, where such a letter *was* posted, although with a fictitious address, the prisoner was convicted.(*q*)

A servant was sent to the post with a letter and a penny to prepay the postage, but finding the shopdoor of the receiving house shut, she put the penny inside the letter, fastened it in with a pin, and dropped it into the letter-box, intending that the penny should be applied to the payment of the postage. A messenger, in the General Post Office, stole this letter with the money in it, and Lord Denman held that it came within the de-[298] scription of the act of parliament, viz., a letter containing *money, although the money was not put in for the purpose of being conveyed in the letter.(*r*)

S., postmistress at G., received a letter from D. with 1*l.* for a post office order to be obtained at L., 3*d.* for the poundage, 1*d.* for the postage, and 1*d.* for the messenger who was to get the order. The letter, when received by S., was unsealed, but addressed. She in due course delivered it to the prisoner, who was the post office messenger, with the money, and instructed him to obtain the order at L., inclose it in the letter, and post the letter at L. He pocketed the money, and never delivered the letter at L.: and it was held by Cresswell, J., that, under these circumstances, the letter must be considered as a post letter, and the prisoner in the employ of the Post Office; and he was convicted under the statute.(*s*)

(*o*) Reg. v. Rathbone, Carr. & M. 220; S. C. 2 Moo. C. C. 242.
(*p*) Reg. v. Gardner, 1 Carr. & K. 628; but see Reg. v. Newey, ibid. 630, note; Reg. v. Young, Carr. & K. 466.
(*q*) Reg. v. Young, 2 Carr. & K. 466.
(*r*) Reg. v. Mence, Carr. & M. 234.
(*s*) Reg. v. Bickerstaff, 2 Carr. & K. 761.

But in another case,(*t*) where a person delivered two 5*l.* notes to the wife of the postmaster at C. (where money orders were not granted,) and asked her to send them by the letter carrier from C. to W., in order that he might get two 5*l.* money orders at the W. post office; she gave instructions, accordingly, to the letter carrier, and by his desire put the notes into his bag, but he afterwards took them out and pretended he had lost them, (having no intention of stealing them at the time he received them:) it was held by the fifteen Judges, that this was not larceny, the notes not being in the possession of the prisoner in the course of his duty as a Post Office servant.

A post office being at an inn, a person was sent to put a letter containing promissory notes into the post; he took it to the inn with money to prepay the postage; he did not put it into the letter box, but laid the letter with the money upon it upon a table in the passage of the inn, in which passage the letter box was, and pointed out the letter to the prisoner, who was a female servant in the inn, who said "she would give it to them." The prisoner, who was not authorized by the innkeeper, her master, to receive letters for him, stole the letter and its contents: and Patteson, J., held, that this was not a post letter within the meaning of the act; so the prisoner was convicted of larceny.(*u*)

*By the 11 and 12 Vict. c. 88, s, 4, it is enacted, that every officer of the Post Office who shall grant or issue any money order with a fraudulent intent shall, in England and Ireland, be guilty of felony, and in Scotland of a high crime and offence, and shall, at the discretion of the Court, either be transported beyond the seas for the term of seven years or be imprisoned for any term not exceeding three years.(*v*) [*299]

*CHAPTER IX. [*300]

JURISDICTION OF JUSTICES IN DISPUTES BETWEEN MASTERS AND SERVANTS.

Generally—20 Geo. 2, c. 19; 6 Geo. 3, c. 25; 4 Geo. 4, c. 34 300
Cases provided for by 4 Geo. 4, c. 34 313
Order or Conviction and Warrant of Commitment 315
Arbitration of Disputes between Masters and Workmen, 5 Geo. 4. c. 96 318

JURISDICTION OF JUSTICES GENERALLY.

By construction of law upon the statute 5 Eliz. c. 4, (which enabled

(*t*) Reg. v. Glass, 2 Carr. & K. 395. (*u*) Rex v. Harley, 1 Carr. & K. 89.
(*v*) And see sect. 5, as to the indictment.

justices to fix the rate of wages), justices of the peace were held(*a*) to have the power of ordering and enforcing the payment of wages to servants in husbandry. But the statute of Eliz. being found deficient, as it extended only to such wages as should be rated by the justices, and to servants in husbandry,(*b*) and contained *no power to admit the [*301] servant's oath in evidence, the statute 20 Geo. 2. c. 19, was passed. That act, after reciting that the laws in being for the better regulation of servants, and for the payment of wages to them, and to artificers, handicraftsmen, and labourers, were insufficient and defective, enacted (sect. 1), that after the 25th of March, 1747, "all complaints, differences, and disputes which shall happen or arise between masters or mistresses and servants in husbandry, who shall be hired for one year or longer,(*c*) or which shall happen or arise between masters or mistresses and artificers,(*d*) handicraftsmen, miners, colliers, keelmen, pitmen,(*e*) glassmen, potters, and other *labourers*(*f*) *employed for any certain time or in any other manner*,(*g*) shall be heard and determined by one or more justice or justices of the peace of the county, riding, city, liberty, town corporate, *or place where such master or mistress shall inhabit,(*h*) (al- [*302] though no rate or assessment of wages has been made that year by the justices of the peace of the shire, riding, or liberty, or by the mayor, bailiffs, or other head officer where such complaints shall be

(*a*) Reg. v. Gouche, 2 Salk. 441; S. C. 2 Ld. Raym. 820; Shergold v. Holloway, 2 Str. 1002.

(*b*) The jurisdiction of justices in disputes between masters and servants in trades is conferred by various acts of parliament relating to particular trades, which, for the convenience of reference, have been arranged alphabetically in a table printed in the Appendix. The principal of those acts (viz. 20 Geo. 2, c. 19; 6 Geo. 3, c. 25; 4 Geo. 4, c. 34; 5 Geo. 4, c. 96) are here given in the text, together with the cases decided upon them, as they are applicable to almost all trades, the operation of the three first having been extended by 10 Geo. 4, c. 52, to the several manufactures, trades and occupations mentioned in 17 Geo. 3, c. 56, (see Appendix). Most of the other acts will be also found in the Appendix. In proceedings under these statutes the provisions of 11 & 12 Vict. c. 43, "An Act to facilitate the Performance of the Duties of Justices of the Peace out of Sessions within England and Wales with respect to Summary Convictions and orders," must now be attended to. See Archibold's Jervis's Acts, p. 136, 3rd ed.

(*c*) See note (*g*), infra.

(*d*) By 6 Geo. 3, c. 25, s. 4, and 4 Geo. 4, c. 34, s. 3, "calico printers" are added.

(*e*) In the Stannaries in Devon and Cornwall, 27 Geo. 2, c. 6, s. 2.

(*f*) In Lowther v. Earl of Radnor, 8 East, 113, a labourer who contracted to dig and stean a well was held within this act. That case, however, proceeded upon the facts laid in the information before the justice. In order to give a magistrate jurisdiction now there must either be an actual *service*, or a contract of service. See Hardy v. Ryle, 9 B. & C. 603; Lancaster v. Greaves, 9 B. & C. 628. In Willes v. Cooper, 3 A. & E. 524, it was considered doubtful whether under this act and 4 Geo. 4, c. 34, justices had power to order payment on an information "for wages for labour as a carpenter." And see Riley v. Warden, 2 Exc. 59, as to the meaning of the word "labour" in the Truck Act, 1 & 2 Wm. 4, c. 37: and Reg. v. Wortley, 21 L. J., N. S., M. C., 44, ante, p. 26, on the meaning of that word in the Stamp Act.

(*g*) By 31 Geo. 2, c. 11, s. 3, this act is extended to all servants employed in husbandry though hired for a *less time than one year*.

(*h*) By 4 Geo. 4, c. 34, s. 3, post, p. 310, the complaint is to be made to "any justice of the peace of the county or place where such servant, &c., shall have *so contracted*" to serve, "or be employed or be found." And the commitment must shew that the magistrate had jurisdiction. See Johnson v. Reid, 6 M. & W. 124; Lindsay v. Leigh 11 Q. B. 455; Askew's case, 2 L. M. & P. 429.

made, or where such differences or disputes shall arise,(*i*)) which said justice or justices is and are hereby empowered to examine upon oath any such servant, artificer, handicraftsman, miner, collier, keelman, pitman, glassman, potter, or other labourer, or any other witness or witnesses, touching any such complaint, difference, or dispute, and to make such order for payment of so much wages to such servant, artificer, handicraftsman, miner, collier, keelman, pitman, glassman, potter, or other labourer, as to such justice or justices shall seem just and reasonable, provided that the sum in question do not exceed ten pounds with regard to any servant, nor five pounds with regard to any artificer, handicraftsman, miner, collier, keelman, pitman, glassman, potter, or labourer; and in case of refusal or non-payment of any sums so ordered by the space of one-and-twenty days(*k*) next after such determination, such justice and justices shall and may issue forth his or their warrant to levy the same by distress and sale of the goods and chattels of such master or mistress, or person employing such artificer, handicraftsman, miner, collier, keelman, pitman, glassman, potter, or other labourer, rendering the overplus to the owners after payment of the charges of such distress and sale."(*l*)

*2. That it shall and may be lawful to and for such justice or justices upon application, on complaint made upon oath by any [*303] master or mistress, or employer,(*m*) against any such servant, artificer, handicraftsman, miner, collier, keelman, pitman, glassman, potter, or labourer, touching or concerning any misdemeanor, miscarriage, or ill-behaviour in such his or her service or employment (which oath such justice or justices is and are hereby empowered to administer,) to hear, examine and determine the same, and to punish the offender by commitment to the houses of correction, there to remain and be corrected(*n*) and held to hard labour for a reasonable time not exceeding one calendar month, or otherwise by abating some part of his or her wages, or by discharging such servant, artificer, handicraftsman, miner, collier, keelman, pitman, glassman, potter, or labourer from his, her, or their service or employment; and in like manner, also, it shall and may be lawful for such justice or justices, upon any complaint or application upon oath by any such servant, artificer, handicraftsman, miner, collier, keelman, pitman, glassman, potter, or other labourer, against such master, mistress, or employer, touching or concerning any misusage, refusal of necessary provision, cruelty, or other ill-treatment of, to, or towards such servant,

(*i*) In Branwell v. Penneck, 7 B. & C. 539, Bayley, J., said, "these words imply that the legislature did not contemplate *all* labourers, but those only with reference to whom the justices had power to make a rate of wages," under 5 Eliz. c. 4, s. 15.

(*k*) See now 4 Geo. 4, c. 34, s. 5, post, p. 312.

(*l*) In Wiles v. Cooper, 3 A. & E. 524, it was held, that justices had no power under this sect. and 4 Geo. 4, c. 34, and 5 Geo. 4, c. 18, s. 2, to commit the master in default of distress. But that power is now expressly given by 11 & 12 Vict. c. 43, s. 22, under which he may be committed to gaol for any term not exceeding three calendar months.

(*m*) "Or by his, her or their steward, manager or agent;" 6 Geo. 3, c. 25, s. 4, and 4 Geo. 4, c. 34, s. 3. "Or by his counsel or attorney or other person authorized in that behalf;" 11 & 12 Vict. c. 43, s. 10.

(*n*) "Corrected," means whipped, and is a necessary part of the judgment *under this act;* Rex v. Hoseason, 14 East, 607. See now, however, 4 Geo. 4, c. 34, s. 3, and Wood v. Fenwick, 10 M. & W. 195.

artificer, handicraftsman, miner, collier, keelman, pitman, glassman, potter, or other labourer, and to summon such master, mistress, or employer to appear before such justice or justices at a reasonable time to be prefixed in such summons, and such justice or justices shall and may examine into the matter of such complaint, whether such master, mistress, or employer shall appear or not, proof being made upon oath of his or her being duly summoned, and upon proof thereof, made upon oath to his or their satisfaction, to discharge such servant, artificer, handicrafts-[*304] man, miner, *collier, keelman, pitman, glassman, potter, or other labourer of and from his said service and employment, which discharge shall be given under the hand and seal or hands and seals of such justice or justices, gratis.

3. That it shall and may be lawful to and for any two or more such justices, upon any complaint or application by any apprentice put out by the parish, or any other apprentice upon whose binding out no larger a sum than five(*o*) pounds of lawful British money was paid, touching or concerning any misusage, refusal of necessary provisions, cruelty, or other ill-treatment of or towards such apprentice by his or her master or mistress,(*p*) to summon such master or mistress to appear before such justices, at a reasonable time to be named in such summons, and such justices shall and may examine into the matter of such complaint, and upon proof thereof, made upon oath to their satisfaction, (whether the master or mistress be present or not, if service of the summons be also upon oath proved,) the said justices may discharge(*q*) such apprentice by warrant or certificate under their hands and seals, for which warrant or certificate no fee shall be paid.

4. That it shall and may be lawful to and for such justices, upon application or complaint made upon oath by any master or mistress against any such apprentice, touching or concerning any misdemeanor, miscarriage, or ill-behaviour in such his or her service, (which oath such justices are hereby empowered to administer,) to hear, examine, and determine the same, to punish the offender by commitment to the house of [*305] correction, there to remain and be corrected and held to hard *labour for a reasonable time not exceeding one calendar month, *or* otherwise by discharging(*r*) such apprentice in manner and form before mentioned.

5. Provided nevertheless, that if any person or persons shall think

(*o*) This was extended to ten pounds by 33 Geo. 3, c. 55, and has since been further extended to twenty-five pounds by 4 Geo. 4, c. 29, or, if nothing at all was paid, 5 & 6 Vict. c. 7.

(*p*) See further, ante, p. 303, note (*m*).

(*q*) Under 32 Geo. 3, c. 57, s. 11, the justices may order the apprentice's clothes to be given up, and the master, &c., to pay a sum not exceeding ten pounds for placing the apprentice out again; and by sect. 12, when such master is liable to take another parish apprentice he may be fined ten pounds instead. By 33 Geo. 3, c. 55, the master may also be fined, not exceeding forty shillings. And by 4 Geo. 4, c. 29, justices, discharging an apprentice, may order all or any part of the premium paid with him to be refunded.

(*r*) By 32 Geo. 3, c. 57, s. 13, the justice may *also* order the apprentice to be punished "by commitment to the house of correction, there to remain and be corrected, [*i. e.*, whipped,] and kept to hard labour for a reasonable time, not exceeding three calendar months." That act also gives an appeal to the quarter sessions.

himself, herself, or themselves agrieved by such determination, order, or warrant of such justice or justices aforesaid, (save and except any order of commitment,)(s) he, she, or they may appeal(t) to the next general quarter sessions of the peace to be held for the county, riding, liberty, city, town corporate or place where such determination or order shall be made, which said next general quarter sessions is hereby empowered to hear and finally determine the same, and to give and award such costs to any of the respective persons appellant or respondent as the said sessions shall judge reasonable, not exceeding forty shillings, the same to be levied by distress and sale in manner before mentioned.

6. Provided also, that no writ of certiorari(u) or other process shall issue or be issuable to remove any proceedings whatever, had in pursuance of this act, into any of his majesty's courts of record at Westminster.(v)

By 6 Geo. 3, c. 25, after reciting that persons employed in several manufactories of this kingdom frequently take apprentices who are very young, and for several years of their apprenticeship are rather a burthen than otherwise to their masters: and that it frequently happens that such apprentices, when they might be expected *to be useful to their masters, absent themselves from their service: and that the laws [*306] in being are not sufficient to prevent these inconveniences; for remedy thereof it is enacted (sect. 1,) That after the 24th June, 1766, if any apprentice shall absent himself from his master's service before the term of his apprenticeship shall be expired, every such apprentice shall at any time or times thereafter, whenever he shall be found, be compelled to serve his said master for so long a time as he shall have so absented himself from such service, unless he shall make satisfaction to his master for the loss he shall have sustained by his absence from his service, and so from time to time as often as any such apprentice shall, without leave of his master, absent himself from his service before the term of his contract shall be fulfilled; and in case any such apprentice shall refuse to serve as hereby required, or to make such satisfaction to his master, such master may complain upon oath to any justice of the peace of the county or place where he shall reside, which oath such justice is hereby empowered to administer, and to issue a warrant under his hand and seal for apprehending any such apprentice, and such justice, upon hearing the complaint, may determine what satisfaction shall be made to such master by such apprentice, and in case such apprentice shall not give security to make such satisfaction according to such determination, it shall and may

(s) See 6 Geo. 3, c. 25, s. 5, post, p. 307, and note (x), ibid.

(t) See 4 Geo. 4, c. 34, s. 5.

(u) This section, taking away the writ of certiorari, would not apply to proceedings under 4 Geo. 4, c. 34. See Rex v. Terret, 2 T. R. 735. In Ex parte Lord, 4 D. & L. 405, a certiorari was issued to bring up a conviction under 4 Geo. 4, c. 34. And as a general rule the Court of Queen's Bench will grant a certiorari to bring up and quash a conviction or order, &c., made by a justice in a case where he has *no* jurisdiction, or where he *exceeds* his jurisdiction, although it is expressly taken away by statute; Rex v. The Justices of Somersetshire, 5 B. & C. 816.

(v) Sect. 7, excluding the Stannaries from the operation of this act, was repealed by 27 Geo. 2, c. 6.

be lawful for such justice to commit every such apprentice to the house of correction for any time not exceeding three months.

2. Provided always, that nothing in this act contained shall extend to any apprentice whose master shall have received with such apprentice the sum of ten pounds.

3. Provided also, that no apprentice shall be compelled to serve for any time or term, or to make any satisfaction to any master after the expiration of seven years next after the end of the term for which such apprentice shall have contracted to serve, anything herein contained to the contrary notwithstanding.

By sect. 4. After reciting that it frequently happens that artificers, calico printers, handicraftsmen, miners, colliers, keelmen, pitmen, glassmen, potters, labourers, and others(*v*) who contract with persons for certain *terms do leave their respective services before the terms of [*307] their contracts are fulfilled, to the great disappointment and loss of the persons with whom they so contract; for remedy thereof it is enacted, that after 24th June, 1766; if any artificer, calico printer, handicraftsman, miner, collier, keelman, pitman, glassman, potter, labourer, or other person(*vv*) shall contract with any person whomsoever for any time or term whatsoever, and shall absent himself from his service before the term of his contract shall be completed, or be guilty of any other misdemeanor, that then and in every such case it shall and may be lawful for any justice of the peace of the county or place where any such artificer, calico printer, handicraftsman, miner, collier, keelman, pitman, glassman, potter, labourer, or other person shall be found, and such justice is hereby authorized and empowered upon complaint thereof made upon oath to him by the person with whom such artificer, calico printer, handicraftsman, miner, collier, keelman, pitman, glassman, potter, labourer, or other person shall have so contracted, *or by his or her steward or agent*,(*w*) which oath such justice is hereby empowered to administer, to issue his warrant for the apprehending of every such artificer, calico printer, handicraftsman, miner, collier, keelman, pitman, glassman, potter, labourer, or other person, and to examine into the nature of the complaint, and if it shall appear to such justice that any such artificer, calico printer, handicraftsman, miner, collier, keelman, pitman, glassman, potter, labourer, or other person shall not have fulfilled such contract or have been guilty of any misdemeanor, it shall and may be lawful for such justice to commit every such person to the house of correction for the county or place where such justice shall reside for any time not exceeding three months nor less than one month.

5. Provided always, that if any person shall think himself aggrieved by such determination, order, or warrant of any justice of the peace as aforesaid, (except an order of commitment,)(*x*) every such person may

(*v*) This act does not extend to domestic servants; Kitchen v. Shaw, 6 A. & E. 729; only to persons of the same description as those before enumerated.

(*vv*) See last note. (*w*) See ante, p. 303, note (*m*).

(*x*) In Rex v. Justices of Staffordshire, 12 East, 572, it was held, that no appeal lies to the sessions against a conviction and commitment in execution for three months of a collier, under this statute, for absenting himself from his master's service, as the

*appeal to the next general quarter sessions of the peace to be held for the county or place where such determination or order [*308] shall be made, such person giving six days notice of his intention of bringing such appeal, and of the cause and matter thereof to such justice of the peace and the parties concerned, and entering into recognizance within three days after such notice before some justice of the peace for such county or place, with sufficient surety conditioned to try such appeal at, and abide the order or judgment of, and pay such costs as shall be awarded by the justices at such quarter sessions, which said justices, at their said sessions, upon due proof of such notice being given and of entering into such recognizance as aforesaid, shall and are hereby directed to proceed in, hear and determine the causes and matters of all such appeals, and shall give such relief and costs to the parties appealing or appealed against as they in their discretion shall judge proper and reasonable, and their judgments and orders therein shall be final and conclusive to all parties concerned.

6. Provided also that nothing in this act contained shall extend to the Stannaries in the counties of Devon and Cornwall, or to impeach or lessen the jurisdiction of the Chamberlain of the city of London, or of any other court within the said city touching apprentices.

By 4 Geo. 4, c. 34,(*y*) after reciting the 20 Geo. 2, c. 19, 6 Geo. 3, c. 25, and 4 Geo. 4, c. 29,(*z*) and that it was expedient to extend the powers of the said acts, it is enacted (sect. 1,) That it shall and may be lawful, not only for any master or mistress, but also for his or her steward, manager, or agent(*a*) to make complaint upon oath against any apprentice, within the meaning of the *said before recited acts, [*309] to any justice of the peace of the county or place where such apprentice shall be employed, of or for any misdemeanor, misconduct, or ill behaviour(*b*) of any such apprentice, or, if such apprentice shall have absconded, it shall be lawful for any justice of the peace of the county or place where such apprentice shall be found, or where such apprentice shall have been employed, and any such justice is hereby empowered, upon complaint thereof made upon oath by such master, mistress, steward, manager, or agent, which oath the said justice is hereby empowered to administer, to issue his warrant for apprehending every such apprentice, and, further, that it shall be lawful for any such justice to hear and determine the same complaint, and to punish the offender by abating the whole or any part of his or her wages, or otherwise by commitment to

order of commitment contained the conviction; and see Lindsay v. Leigh, 11 Q. B. 455; but see now 11 & 12 Vict. c. 43, s. 14, since which it would seem that the conviction can no longer form part of the commitment. See Archb. Jervis's Acts, 3rd ed. p. 136.

(*y*) By 10 Geo. 4, c. 52, the provisions of this act are extended "to all persons engaged whether as masters, servants, apprentices or otherwise, in the several manufactures, trades and occupations mentioned in 17 Geo. 3, c. 56, (see Appendix,) in the same manner as if such persons had been specially mentioned therein; and see 6 & 7 Vict. c. 40, (also in the Appendix,) as to hosiery manufacturers.

(*z*) Ante, p. 304, note (*q*).

(*a*) And see ante, p. 303, note (*m*).

(*b*) This would not only apply where a substantive felony has been committed, or is charged, in which case the prisoner is entitled to the verdict of a jury; In re Jacklin, 2 D. & L. 103.

the house of correction, there to remain and be held to hard labour for a reasonable time not exceeding three months.

2. That all complaints, differences, and disputes which shall arise between masters or mistresses and their apprentices, within the meaning of the said before recited acts or any of them, touching or concerning any wages which may be due to such apprentices, shall and may be heard and determined by one or more justice or justices of the peace of the county or place where such apprentice or apprentices shall be employed, which said justice or justices is and are hereby empowered to examine on oath any such master or mistress, apprentice or apprentices, or any witness or witnesses, touching any such complaint, difference, or dispute, and to summon such master or mistress to appear before such justice or justices at a reasonable time to be named in such summons, and to make such order for payment of so much wages to such apprentice or apprentices as, according to the terms of his, her, or their indentures of apprenticeship, shall appear to such justice or justices, under all the circumstances of the case, to be justly due, (provided that the sum in question do not exceed the sum of ten pounds,) the amount of such wages to be paid within such [*310] period as the said justice or justices shall think *proper, and shall order the same to be paid; and in case of a refusal or non-payment thereof, such justice or justices shall and may issue forth his and their warrant to levy the same by distress and sale of the goods and chattels of such master or mistress, rendering the overplus to the owners after payment of the charges of such distress and sale.

3. That if any servant in husbandry, or any artificer, calico printer,(c) handicraftsman, miner, collier, keelman, pitman, glassman, potter, labourer, or other person, shall contract with any person or persons whomsoever to serve him, her or them for any time or times whatsoever, or in any other manner, and shall not enter into or commence his or her service according to his or her contract, (such contract being in writing and signed by the contracting parties,) or, having entered into such service, shall absent himself or herself from his or her service before the term of his or her contract (whether such contract shall be in writing or not in writing) shall be completed, or neglect to fulfil the same, or be guilty of any other misconduct or misdemeanor in the execution thereof, or otherwise respecting the same, then and in every such case it shall and may be lawful for any justice of the peace of the county or place where such servant in husbandry, artificer, calico printer, handicraftsman, miner, collier, keelman, pitman, glassman, potter, labourer, or other person shall have so contracted or be employed or be found, and such justice is hereby authorized and empowered, upon complaint thereof made upon oath to him by the person or persons, or any of them, with whom such servant in husbandry, artificer, calico printer, handicraftsman, miner, collier, keelman, pitman, glassman, potter, labourer, or other person shall have so contracted, or by his or their steward, manager, or agent, which oath such justice is hereby empowered to administer, to issue his warrant for

(c) A "designer" is within the act; Ex parte Ormrod, 1 D & L. 825. See further post, p. 314.

the apprehending every such servant in husbandry, artificer, calico printer, handicraftsman, miner, collier, keelman, pitman, glassman, potter, labourer, or other person, and to examine into the nature of the complaint, and if it shall appear to such justice that any servant in husbandry, artificer, calico printer, handicraftsman, miner, collier, keelman, pitman, glassman, potter, labourer, or other *person shall not have fulfilled such contract, or hath been guilty of any other misconduct [*311] or misdemeanor as aforesaid, it shall and may be lawful for such justice to commit every such person to the house of correction, there to remain and be held to hard labour for a reasonable time, not exceeding three months, and to abate a proportionable part of his or her wages for and during such period as he shall be so confined in the house of correction, or, in lieu thereof, to punish the offender by abating the whole or any part of his or her wages, or to discharge such servant in husbandry, artificer, handicraftsman, calico printer, miner, collier, keelman, pitman, glassman, potter, labourer, or other person from his or her contract, service, or employment, which discharge shall be given under the hand and seal of such justice, gratis.

By sect. 4, after reciting that it frequently happens that such masters, mistresses, or employers reside at considerable distances from the parishes or places where their business is carried on, are occasionally absent for long periods of time, either beyond the seas or at considerable distances from such parishes or places, and during such residence, or occasional absences, entrust their business to the management and superintendence of stewards, agents, bailiffs, foremen, or managers, whereby such servants, artificers, handicraftsmen, miners, colliers, keelmen, pitmen, glassmen, potters, labourers, or other persons, and apprentices, are and may be subjected to great difficulties and hardships and put to great expense in recovering their wages; it is enacted, that in either of the said cases it shall and may be lawful to and for any justice or justices of the county or place where such servant in husbandry, artificer, handicraftsman, miner, collier, keelman, pitman, glassman, potter, labourer, or other person or apprentice shall be employed, upon the complaint of any such servant, artificer, handicraftsman, miner, collier, keelman, pitman, glassman, potter, labourer, or other person or apprentice touching or concerning the non-payment of his or her wages, to summon such steward, agent, bailiff, foreman or manager to be and appear before him or them at a reasonable time to be named in such summons, and to hear and determine the matter of the complaint in such and the like manner as complaints of the like nature against any master, mistress, or employer are *directed to be heard and determined in and by this and the before recited acts, and also to make an order for the payment by [*312] such steward, agent, bailiff, foreman, or manager of such servant, artificer, handicraftsman, miner, collier, keelman, pitman, glassman, potter, labourer, or other person or apprentice, of so much wages as to such justice or justices shall appear to be justly due, provided that the sum in question do not exceed the sum of ten pounds; and in case of refusal or non-payment of any sum so ordered to be paid by such steward, agent, foreman, bailiff or manager for the space of twenty-one days from

the date of such order, such justice or justices as aforesaid shall and may issue forth his or their warrant to levy the same by distress and sale of the goods and chattels of such master, mistress, or employer, rendering the overplus to the owner or owners, or to such steward, agent, bailiff, foreman or manager for the use of such master, mistress, or employer, after the payment of the charges of such distress and sale.

By sect. 5, it is enacted, that every justice or justices of the peace before whom any complaint shall be made in pursuance of the said recited act, 20 Geo. 2, c. 19, or of 31 Geo. 2, c. 11, intituled An Act to amend an Act made in the Third Year of the reign of King William and Queen Mary, intituled An Act for the better explanation and supplying the defects of the former Laws for the Settlement of the Poor, so far as the same relates to Apprentices gaining a Settlement by Indenture; and also to empower Justices of the Peace to determine Differences between Masters and Mistresses and their Servants in Husbandry touching their Wages, though such Servants are hired for less time than a Year, shall and may order the amount of the wages that shall appear to be due to any servants in husbandry, artificers, labourers, or other person named in the said acts, or either of them, to be paid to the persons entitled thereto within such period as the said justice or justices shall think proper; and in case of refusal or non-payment thereof shall and may levy the same by distress and sale in manner, directed by the said first mentioned act; and every order or determination of such justice or justices made under this act shall be final and conclusive, anything in either of the said acts contained to the contrary in anywise notwithstanding.

[*313] 6. Provided always, that nothing in this act contained *shall extend to impeach or lessen the jurisdiction of the chamberlain of the city of London, or of any other Court within the said city, touching apprentices.

CASES PROVIDED FOR BY 4 GEO. 4, C. 34.

This statute, 4 Geo. 4, c. 34, s. 3, provides for two classes of cases: First, where a servant contracts in writing to serve and does not enter upon his service; and, second, where under a contract, either oral or in writing, he enters upon the service and absents himself from such service(*d*) wilfully or without lawful excuse.(*e*) And every order, conviction, or warrant of commitment under the statute must shew that the case belongs to one or other of the two classes.(*f*) The main difference between these two classes is, that in the former a *written* contract is necessary, which, it would seem, must be signed by *both*(*g*) the contracting parties, since the requirements of the Statute of Frauds (which, as we

(*d*) Per Wightman, J, in Askew's case, 2 L. M. & P. 429.

(*e*) Seth Turner's case, 9 Q. B. 80; and see Lindsay v. Leigh, 11 Q. B. 455; Lilley v. Elwin, 11 Q. B. 742.

(*f*) Vide post, p. 315; Johnson v. Reid, 6 M. & W. 124; Lindsay v. Leigh, 11 Q. B. 455; Askew's case, 2 L. M. & P. 429.

(*g*) This point was *raised*, but not *decided*, in Reg. v. Lord, 12 Q. B. 762.

have seen, only requires an agreement within it to be signed by the *party to be charged*,(*h*)) whilst in the latter class oral evidence of a contract will suffice. But in both classes of cases it is equally necessary that there should be a *contract* of hiring and service in some one or other of the capacities mentioned in the statute, or in some capacity ejusdem generis with those mentioned in the statute;(*i*) and that such contract should be *legally binding* upon both parties.(*k*)

It has, therefore, been held, that a magistrate had no jurisdiction over a contract to weave certain pieces of silk goods at certain prices agreed upon;(*l*) or a contract to make and complete a road of certain dimensions, *according a specification, for a certain sum;(*m*) or a contract to print certain pieces of woollen cotton goods,(*n*)—as [*314] these were not contracts of *hiring and service*, but of a different nature. A contract to serve H. and Co., who were calico printers, as a "designer," for a term of years, has, however, been held to be a contract or service within 4 Geo. 4, c. 34.(*o*) Moreover, the contract of service must also be a contract to serve in some one or other of the *capacities* mentioned in the statute. Where, therefore, a commitment merely stated that complaint had been made against E., *servant* to C., for misconduct, &c. in his said service: it was held insufficient for not stating the nature of the service.(*p*) And a warrant which stated that A. B., "a miner," contracted to serve D. and Co., but omitted to add "in the employment of a miner," was held bad.(*q*) And so, a fortiori, it would be bad, if the capacity of service mentioned, or not mentioned, or not ejusdem generis with those mentioned, in the statute. On the latter ground, a menial servant has been held *not* to be within the statute.(*r*) Over domestic servants therefore, a magistrate has no jurisdiction under this act of parliament, or the other statutes in pari materia.

It has, however, been held not to be necessary to state under which of the various employments enumerated in 4 Geo. 4, c. 34, s. 3, the service might be classed, but that it was sufficient if the Court should be of opinion *that the service mentioned was a service within that [*315] section.(*s*)

If the misconduct complained of amount to felony, a magistrate cannot dispose of the case summarily, but it must be sent to a jury.(*t*)

(*h*) Ante, p. 24. (*i*) See Kitchen v. Shaw, A. & E 729.
(*k*) Reg. v. Lord, 12 Q. B. 757, post, p. 315.
(*l*) Hardy v. Ryle, 9 B. & C. 603.
(*m*) Lancaster v. Greaves, 9 B & C. 628.
(*n*) Ex parte Johnson, 7 Dowl. 702; Johnson v. Reid, 6 M. & W. 122.
(*o*) Ex parte Ormrod, 1 D. & L. 825; S. C. 1 New Sess. Cas. 38.
(*p*) Re Copestick, 1 New Sess. Cas. 181. See also Rex v. Helling, 1 Str. 8; Rex v. Hulcott, 6 T. R. 583, acc. It was formerly held, that orders of justices for payment of wages sufficiently shewed the jurisdiction of justices over the case, if it appeared from them to be a contract of *service* without shewing the *capacity* but these cases were always wondered at, (see per Pratt, C. J., in Rex v. Cleg, 1 Str. 476,) and at last overruled in Rex v. Helling, ubi supra.
(*q*) Reg. v. Lewis, 1 D. & L 822.
(*r*) Kitchen v. Shaw, 6 A. & E. 729. See Jones v. Williams, 1 C. & P. 459; Rex v. London, 2 Salk. 442. In Bramwell v. Penneck, 7 B. & C. 536, it was held, that a person employed by an attorney to keep possession of goods seized under a fi. fa. was not a servant with 20 Geo. 2, c. 19.
(*s*) Ex parte Ormrod, 1 D. & L. 825; 1 New Sess. Cas. 38.
(*t*) Ex parte Jacklin, 1 D. & L. 103; 1 New Sess. Cas. 280.

Lastly, the contract must be one which is legally binding upon the parties. For where an infant entered into a contract binding him to serve his master, but which authorized the master to stop his wages when the steam-engine stopped working for any cause, and was therefore held to be inequitable and not binding upon the infant, who then absented himself from his work, whereupon the master procured his conviction under 4 Geo. 4, c. 34, s. 3, the Court of Queen's Bench quashed the conviction, as there was no binding contract.(*u*)

ORDER OR CONVICTION, AND WARRANT OF COMMITMENT.

Although it seems that the provisions of 11 & 12 Vict. c. 43, are applicable to the class of cases now under consideration,(*v*) yet, inasmuch as the use of the forms provided by that act is not compulsory,(*w*) and other forms are still sometimes used,(*x*) (though, it is conceived, unwisely,)(*y*) it is still necessary to advert briefly to the various decisions which have taken place upon the validity of various forms of orders or convictions, and warrants of commitment, under 4 Geo. 4, c. 34.

It does not appear to have been ever distinctly decided whether this *instrument* is to be regarded as a conviction, and as such, construed strictly; or as an order, and, as such, construed with a less degree of strictness than is required in the construction of a conviction.(*z*) The *statutes 20 Geo. 2, c. 19, and 6 Geo. 3, c. 25, indeed, both speak(*a*) of an *order* of commitment, an expression which, according to the criterion laid down by Lord Hardwicke in Rex v. Lloyd,(*b*) as explained by Denison, J., in Rex. v. Bissex,(*c*) shews that a commitment under either of those statutes should be considered as an *order*, and not as a *conviction;* and it was so treated by Lord Ellenborough in Rex. v. The Justices of Staffordshire.(*d*) The 4 Geo. 4, c. 34, also appears only to contemplate *one instrument*, by whatever name it is to be called.(*e*) And it has been held, that under that statute a separate conviction is not necessary; or rather that the commitment may operate as a conviction.(*f*) But it has also been held, that it is necessary to the validity of that course of proceeding—(embodying the conviction in the commitment,) that the warrant of commitment should shew that the magistrate had done all that was necessary to make the conviction lawful;(*g*) as well as facts bringing the case within the jurisdiction of the magis-

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(*u*) Reg. v. Lord, 12 Q. B. 757.

(*v*) See Archb. Jervis's Acts, p. 136. See also Reg. v. Hyde, 21 L. J., N. S., M. C., 94. (*w*) See sect. 32.

(*x*) See Askew's case, 2 L. M. & P. 429.

(*y*) As those forms when followed are sufficient; Reg. v. Hyde, ubi supra.

(*z*) See generally on this difference between orders and convictions; Paley on Conv. 131; Ormerod v. Chadwick, 16 M. & W. 367; Reg. v. Preston, 12 Q. B. 826.

(*a*) In sect. 5 of each statute. (*b*) 1 Str. 996.

(*c*) See 1 Chitty's Burn's Just. tit. "Distress;" S. C. Sayer, 304; Paley on Conv. 133, 134. (*d*) 12 East, 572. See 11 Q. B. 464.

(*e*) Per Parke, B., in Lindsay v. Leigh, 11 Q. B. 464.

(*f*) Johnson v. Reid, 6 M. & W. 124; Ex parte Johnson, 7 Dowl. 702; Lindsay v. Leigh, 11 Q. B. 464.

(*g*) Reg. v. Tordoft, 5 Q. B. 939; S. C. 1 New Sess. Cas. 171.

trate.(*h*) "Every instrument," said Parke, B., in Lindsay v. Leigh,(*i*) "which is to affect a man's liberty or property out of the course of the common law, ought, on the face of it, to shew the authority sufficiently." Where, therefore, it did not appear that the contract of service was in writing, or had been entered into,(*k*) or that the service mentioned was in some one or other of the capacities mentioned in the statute,(*l*) the warrant of committal was held bad. And so, also where it did not appear that the witnesses were examined on oath,(*m*) or in the prisoner's presence.(*n*) *And a similar decision was made where it only appeared upon the warrant that the servant *absented himself* from [*317] his master's service, without "adding wilfully," or "without lawful excuse," or words to that effect.(*o*) And it has lately been held, that the statement in a warrant that a servant *absented* himself, did not imply that he had entered into his master's service.(*p*)

Whilst the 3 Geo. 4, c. 23, was in force,(*q*) it was held that the evidence should be set out in the conviction;(*r*) and that a warrant was bad which contained no adjudication of imprisonment.(*s*)

Where a conviction under 4 Geo. 4, c. 34, s. 3, adjudged that the servant should be imprisoned in the house of correction, there to remain and be held to hard labour for one month, but the commitment (which was by a separate instrument) required the keeper to receive him into custody, there to remain *and be corrected* and held to hard labour for one month, (following the words of 20 Geo. 2, c. 19, s. 2:) it was held, that *correction* meant something more than hard labour, and that the commitment was bad, as varying from the conviction, and ordering a punishment not warranted by the statute.(*t*)

Where a return by a gaolor to a habeas corpus set forth a bad conviction and warrant of a justice under 4 Geo. 4, c. 34, and also proceeded to set forth a good conviction and warrant under the statute (which was delivered a week after, though dated the same day as the first:) it was held, that the prisoner was not entitled to be discharged.(*u*)

A servant convicted under this act, who has reason to think he is wrongly convicted, may apply for a habeas corpus ad subjiciendum, or, to save the expense of his being brought up on habeas corpus, a rule may be obtained on his behalf, from the Court of Queen's Bench, *calling on the justices, the prosecutor, and the keeper of the gaol in [*318] which he is confined, to shew cause why a habeas corpus should not be issued, or why he should not be discharged out of custody without being brought up. Notice of which rule must be given to all the parties.

(*h*) See In re Askew, 2 L. M. & P. 429; In re Copestick, 1 New Sess. Cas. 181, and cas. cit., ante, p. 314.
(*i*) 11 Q. B. 465. (*k*) See notes (*h*), supra.
(*l*) Ante, p. 314, cas. cit.
(*m*) In re Gray, 2 D. & L. 539; S. C. 1 New Sess. Cas 354; Re Jones, 1 New Sess. Cas. 3.
(*n*) Reg. v. Tordoft, 5 Q. B 933; S. C. 1 New Sess. Cas. 171.
(*o*) Seth Turner's case, 9 Q. B. 80. (*p*) Re Askew, 2 L. M. & P. 429.
(*q*) Repealed 11 & 12 Vict. c. 43, s. 36.
(*r*) Hammond's case, 9 Q. B. 92; and see Reg. v. Richards, 5 Q. B. 930.
(*s*) Ibid. (*t*) Wood v. Fenwick, 10 M. & W. 195.
(*u*) Reg. v. Richards, 5 Q. B. 926.

But if no cause be shewn, a habeas corpus must still be issued before the prisoner can be discharged.(*v*)

ARBITRATION OF DISPUTES BETWEEN MASTERS AND WORKMEN.

The statute 5 Geo. 4, c. 96, which consolidated and now regulates the law relative to the arbitration of disputes between masters and workmen, also gives to justices(*w*) certain powers in such cases; and it is, therefore, conceived, that the provisions of that statute may most appropriately be brought before the reader in this place.

The first section after reciting that it is expedient that the laws relative to the arbitration of disputes between master and workmen should be consolidated and amended, and one general law made applicable to every description of trade and manufacture, repeals a variety of former enactments upon the subject. The act then proceeds (sect. 2,) to enumerate the causes of dispute which may be referred to arbitration in the following terms.

2. That the following subjects of dispute arising between masters and workmen, or between workmen and those employed by them, in any trade or manufacture in any part of the United Kingdom of Great Britain and Ireland, *may*(*x*) be settled and adjusted in manner hereafter mentioned; [*319] that is to say, disagreements *respecting the price to be paid for work done or in the course of being done, whether such disputes shall happen or arise between them respecting the payment of wages as agreed upon, or the hours of work as agreed upon, or any injury or damage done or alleged to have been done to the work, or respecting any delay or supposed delay in finishing the work, or the not finishing the work in a good and workmanlike manner, or according to any contract, or to bad materials; cases where the workmen are to be employed to work any new pattern which shall require them to purchase any new implements of manufacture, or to make any alteration upon the old implements for the working thereof, and the masters and workmen cannot agree upon the compensation to be made to such workmen for or in respect thereof; disputes respecting the length, breadth, or quality of pieces of goods, or in the case of cotton manufacture, the yarn thereof, or the quantity and quality of the wool thereof; disputes respecting the wages or compensation to be made for pieces of goods that are made of any great or extraordinary length; disputes in the cotton manufacture respecting the manufacture of cravats, shawls, policat, romal, and other handkerchiefs, and the number to be contained in one piece of such handkerchiefs; disputes arising out of, for, or touching the particular trade or manufacture or contracts relative thereto, which cannot be otherwise mutually adjusted

(*v*) See 2 D. & L. 103, note.

(*w*) By 7 Wm. 4 & 1 Vict. c. 67, s. 3, it is enacted, that wherever the expression "justice of the peace," occurs in 5 Geo. 4, c. 96, it shall be construed to mean "magistrate."

(*x*) Upon the question as to *how far* this is *compulsory*, and ousts the jurisdiction of the superior Courts *when an arbitration is demanded* under sect. 3, the following cases may be consulted with advantage, though they did not arise under this act; Crisp v. Bunbury, 8 Bing. 394; Ex parte Payne, 5 D. & L. 679; Morrison v. Glover, 4 Exc. 430; Doe v. Glover, 15 Q. B. 103, and McDougal v. Paterson, 6 Exc. 337, note; S. C. 2 L. M. & P. 681.

and settled; disputes between masters and persons engaged in sizing or ornamenting goods; but nothing in this act contained shall authorize any justice or justices, acting as hereinafter mentioned, to establish a rate of wages, or price of labour, or workmanship at which the workmen shall in future be paid, unless with the mutual consent of both master and workmen: Provided always that all complaints by any workman as to bad materials shall be made within three weeks of his receiving the same, and all complaints arising from any other cause, shall be made within six(*y*) days after such cause of complaint shall arise.

3. That whenever such subjects of dispute shall arise as aforesaid, it shall be lawful for the master and workman, or either of them, to demand and have an arbitration or reference thereof in manner following, that is to say, where the party complaining and the party complained of shall come before or agree by any writing *under their hands to abide by the determination of any justice of the peace or magistrate of [*320] any county, riding, division, stewartry, barony, city, burgh, town, or place within which *the parties* reside,(*z*) it shall and may be lawful for such justice of the peace or magistrate, to hear and finally determine in a summary manner the matter in dispute between such parties, but if such parties shall not come before or so agree to abide by the determination of such justice of the peace or magistrate, then it shall be lawful for any such justice or magistrate, and such justice of the peace or magistrate is hereby required on complaint made before him, and proof by the examination of the party making such complaint, that application has been made to the person or persons against whom such cause of complaint has arisen, or his, her or their agent or agents, if such dispute has arisen with such agent or agents, to settle such dispute, and that the same has not been settled upon such complaint being made, or, where the dispute relates to a bad warp, that such cause of complaint has not been done away with within forty-eight hours after such application, to summon before him such person or persons, or agent or agents, on some day not exceeding three days exclusive of Sunday, after the making such complaint, giving notice to the persons making such complaint of the time and place appointed in such summons for the attendance of such person or persons, agent or agents, as aforesaid; and if at such time and place the person or persons so summoned shall not appear by himself, herself, or themselves, or send some person on his, her, or their behalf, to settle such dispute, or appearing shall not do away such cause of complaint, then and in such case it shall be lawful for such justice, and he is hereby required at the request of either of such parties, to nominate arbitrators or referees for settling the matters in dispute, and such justice shall then and there at such meeting, propose not less than four nor more than six persons, one-half of whom shall be master manufacturers, or agents or foremen of some master manufacturer, and the other half of whom shall be workmen in such manufacture, such respective persons residing in or near to the place where such disputes shall

(*y*) Extended to fourteen days by 7 Wm. 4 & 1 Vict. c. 67.

(*z*) By 7 Wm. 4 & 1 Vict. c. 67, s. 2, this power may be exercised by the justices or magistrates of the district where *the party complained against* resides.

have arisen; out of which master manufacturers, agents or foremen, the [*321] master *engaged in such dispute, or his agent, shall choose one, and out of which workmen so proposed, the workman or his agent shall choose another, who shall have full power to hear and finally determine such dispute.

4. That in case any or either of the persons so proposed by any such justice shall refuse or delay to accept such arbitration, or accepting, shall not act therein within two days after such nomination, the justice shall proceed to name another or other persons of the descriptions aforesaid, in the room of the person so refusing as aforesaid to be arbitrator or arbitrators, in the place of any such arbitrator or arbitrators so refusing or delaying to accept, or who shall not act; and in every case of a second nomination, the arbitrators shall meet within twenty-four hours after the application for the same, and at the same place at which the meeting of the referees first named was appointed, or at some other convenient place, as the justice may appoint; and the expense of every such application for the appointment of a second referee shall be borne and defrayed by the party through whose default or the default of whose referee such application is rendered necessary, and the justice making such second appointment shall certify the same in the form for that purpose set forth in the act,(*a*) or in some other form to the like effect; and in every case where a second arbitrator shall be appointed as aforesaid, and such second arbitrator shall not attend at the same time and place appointed for settling the matters in dispute, it shall be lawful for the other arbitrator at such time and place, to proceed by himself to the hearing and determining of the same matters in dispute; and in such case the award of such sole arbitrator shall be final and conclusive as to all matters in dispute submitted to such arbitrator, without being subject to review, appeal, or suspension.

By sect. 5 it is enacted, that the arbitrators or referees being so nominated as aforesaid, the said justice shall thereupon appoint a place of meeting according to the directions of this act, and also a day for the meeting; notice of which nomination, and of the day of meeting, shall thereupon be given by such justice to the persons so nominated arbitrators or referees, and to any party to any such dispute who may not have attended the meeting before such justice as aforesaid; which appoint- [*322] ment *shall be by such justice certified in the form there given,(*b*) or in some other form to the like effect; and the persons so appointed as aforesaid shall hear and examine the parties and their witnesses, and determine such dispute within two days after such nomination, exclusive of Sundays; and the determination of such arbitrators shall be final and conclusive.

6. That in all cases where complaints are made respecting bad warps or utensils by workmen, the place of meeting of the referees shall be at or as near as may be to the place where the work shall be carrying on; and in all other cases at or as near as may be to the place or places where the work has been given out.

(*a*) See the form in the Appendix. (*b*) See this form in the Appendix.

7. Provided that if any person so complaining as aforesaid shall not attend or send some person on his or her behalf, at the time and place appointed by such justice of the peace, for the purpose of naming such persons as aforesaid, such person shall not in such case be entitled to the benefit of this act; and if any person against whom any such complaint shall have been made as aforesaid shall not attend or send some person on his or her behalf, the justice of the peace shall thereupon nominate a person for him out of such persons so proposed as aforesaid.

8. That the said arbitrators and referees shall meet at the time and place fixed by the justices of the peace by whom such referees were appointed, and shall, by inspection of the work in regard to which the dispute may have arisen, by hearing and examining the parties, or any other persons on their behalf, or that attend to give evidence respecting the matters in dispute upon oath, (which the said arbitrators and referees are hereby empowered to administer) or otherwise, or by otherwise ascertaining the true state of the case in such manner as to such arbitrators and referees shall appear necessary, proceed to determine the matter or matters in dispute referred to them; and the award to be made by such arbitrators and referees shall be final and conclusive between the parties, without being subject to review or challenge by any Court or authority whatsoever.

9. That it shall be lawful for any arbitrator or arbitrators, referee or referees, and he and they are hereby authorized and required, at the request in writing of any of the parties, to issue his or their summons to any *witness or witnesses to appear and give evidence before such arbitrator or arbitrators, referee or referees, at the time and place [*323] appointed for hearing and determining any such dispute, and which time and place shall be specified in such summons; and if any person so summoned to appear as a witness as aforesaid shall not appear before such arbitrator or arbitrators, referee or referees at the time and place specified in such summons, or offer some reasonable excuse for the default, or appearing according to such summons shall not submit to be examined as a witness and give his evidence before such arbitrator or arbitrators, referee or referees, touching the matter of such dispute, then and in every such case it shall be lawful for any one or more of his Majesty's justices of the peace acting in and for the county, stewartry, riding, division, barony, city, burgh, town, or place, where such dispute shall have arisen, and they are hereby authorized (proof on oath in the case of any person not appearing according to such summons having been first made before such justice or justices of the due service of such summons on every such person, by delivering the same to him, or by leaving the same twenty-four hours before the time appointed for such person to appear before such arbitrator or arbitrators, referee or referees, at the usual place of abode of such person) by warrant under the hands of any such justice or justices to commit any such person so making default in appearing, or appearing and refusing to give evidence, to some prison within the jurisdiction of any such justice or justices, there to remain without bail or mainprize for any time not exceeding two calendar months, nor less than seven days, or until such person shall submit himself to be

examined and give his evidence before such arbitrator or arbitrators, referee or referees, as aforesaid: provided always, that in case such dispute shall be heard and determined before such offender shall submit to be examined and give evidence as aforesaid, then and in every such case he, she, or they shall be imprisoned the full term of such commitment.

10. That in case such arbitrators and referees so appointed cannot agree upon and decide such matter or matters in dispute so referred as aforesaid, or shall not make and sign their award within three days after the date of the order of such justice certifying their appointment, then the said arbitrators and referees shall, without delay, go before the [*324] justice by whom they were *appointed, and in case of his absence or indisposition before any other of his Majesty's justices of the peace acting in and for the county, stewartry, riding, division, barony, city, burgh, town, liberty, or place, and residing nearest to the place where the meeting to settle such dispute shall have taken place, and shall state to such justice or justices who may be present, the points in difference between them the said arbitrators, and referees, which points in difference the said justice or justices shall, and is, and are hereby authorized and required to hear and detetmine upon the statement of the arbitrators and referees, and the said justice or justices is and are hereby directed and required to settle and determine the matter in dispute with all possible dispatch, and in all cases within the space of two days after the expiration of the time hereby allowed to the arbitrators and referees to make and sign their award, and the determination of such justice or justices, shall be final and conclusive between the parties so differing as aforesaid, without being subject to review or challenge by any Court whatsoever.

11. That if either arbitrator or referee shall neglect or refuse to go before such justice of the peace in the manner herein directed, it shall and may be lawful for such justice, after summoning the arbitrators to attend him, to determine the matter or matters in dispute upon the statement and representation of either of the arbitrators who shall come before him.

12. Provided always, that no justice of the peace, being also a master manufacturer or agent, shall act as such justice under this act.

13. Provided always, that as well in all such cases of dispute as aforesaid, as in all other cases, if the parties mutually agree that the matter in dispute shall be arbitrated and determined in a different mode to the one hereby prescribed, such agreement shall be valid, and the award and determination thereon final and conclusive between the parties, and the same proceedings of distress, sale, and imprisonment as hereafter mentioned shall be had towards enforcing such award (by application to any justice of the peace of the county, stewartry, riding, division, barony, city, town, burgh, or place within which the parties shall reside) as are by this act prescribed for enforcing awards made under and by virtue of its provisions.

[*325] 14. Provided always, that where any work shall have *been delivered to any workman by the agent or servant of any master

or masters to be when finished, delivered to such agent or servant, and also where two or more persons shall carry on the business of such manufacture as partners, in every such case respectively the like proceedings shall and may be had and made against such agent, servant, or any partner, and shall be as effectual as if the same had been had and made against the principal or all the partners, and all the said persons respectively shall obey the award made thereupon, and all such order or orders as shall be made by the said justice or justices in or respecting the matters in dispute, and shall be subject to the same proceedings and consequences for refusing or delaying to abide by or perform the same as if the proceedings had been made against the principal or against all the partners.

By sect. 15 it is enacted, that it shall be lawful in all cases for any master or workman, by writing under his hand, to authorize any person to act for him in submitting to arbitration and attending arbitrators or justices touching the matter of any arbitration.

16. Provided also, that in all cases where any proceedings may be had against a master or masters under this act, or where such proceedings shall have been commenced, and the master or masters shall become or be bankrupt, or any assignment of his or their estate or effects shall have been made under the said bankruptcy or otherwise by deed or in law, the factor or trustee upon, or the assignee or assignees of such estate or effects shall be liable to the proceedings authorized by this act against the master or masters as fully as the master or masters was or were before the bankruptcy or assignment, and such proceedings may be commenced or carried on against such factor, trustee, assignee or assignees, who shall fulfil and abide by the award made thereupon, and all such order or orders as shall be made by the said justice or justices in or respecting the matters in dispute, and shall be subject to the same proceedings and consequences for wilfully refusing or delaying to abide by or perform the same, as if the proceedings had been had against the master or masters before his or their bankruptcy, or the assignment of his or their estate or effects: provided that all sums of money to be paid in pursuance of such award or orders shall be recoverable only out of the estate or effects of such master or masters, *and not out of the proper money of such factor, trustee, assignee or assignees. [*326]

17. That where any married woman, or infant under the age of twenty-one years, shall have cause of complaint, in any of the cases provided for by this act, against any master or masters, his or their agent or servant, or factor, or trustee, or assignee or assignees as aforesaid, such complaint may be lodged, and all further proceeding thereupon had, by and in the name of the husband of such married woman, and of the father, or, if dead, of the mother, or if on the death of both parents, of any of the kindred of any such infant, or of the surety or sureties in any indenture of apprenticeship of any such infant being an apprentice, or of any person nominated by such infant if he or she shall not have parent, kindred, or surety; and all such proceedings shall be as effectual, valid, and binding as if such married woman was sole and such infants

were of full age, and pursued by themselves the remedies provided by this act.

18. That with every piece of work given out by the manufacturer to a workman to be done, there shall (if both parties are agreed) be delivered a note or ticket in such form as the said parties shall mutually agree upon, and which said note or ticket, in the event of dispute between the manufacturer, and workman, shall be evidence of all matters and things mentioned therein or respecting the same.(*c*)

19. That a duplicate of every such note or ticket shall be made and kept by the master or agent delivering the same, which duplicate shall be evidence of all the matters and things therein contained, in case the workman shall not produce to the arbitrators or the said justice, as the case may be, the said note or ticket so delivered to him with the said work.(*c*)

20. That it shall not be allowable to any manufacturer, who shall have received into his possession any article, without objection made within twenty-four hours by himself or his clerk or foreman, afterwards to make any complaint on account of work so received.

[*327] 21. Provided always, that if the parties, by and *between whom the said reference shall take place as aforesaid, shall think it expedient or be desirous to extend the time hereby limited for the making the award or umpirage, it shall and may be lawful for them to extend the same accordingly by indorsement, according to the form in the schedule annexed to the act,(*d*) on the back of the order of the justice of peace certifying the appointments of the referees, to be signed by both of them in the presence of one or more credible witness or witnesses.

22. That the award of umpirage to be made upon any reference demanded under this act, shall and may be drawn up and written at the foot or upon the back of the said order certifying the appointment of the referees, according to the form in the schedule to the act annexed.(*d*)

23. That upon fulfilment of the award or umpirage, the same shall be acknowledged by the party in whose behalf the same was made, by an acknowledgment at the foot of the said award, in the form of the schedule to the act annexed,(*d*) which, with the award, shall thereupon be delivered to the party fulfilling the same.

24. That if any party shall refuse or delay to fulfil an award under this act, for the space or term of two days after the same shall have been reduced into writing, it shall be lawful for any such justice as aforesaid, on the application of the party aggrieved, and he is hereby required by warrant under his hand, according to the form in the schedule to the act annexed,(*d*) or in some other form to the like effect, to cause the sum and sums of money directed to be paid by any such award, to be levied by distress and sale of any goods and chattels of the person or persons liable to pay the same, together with all costs and charges attending such dis-

(*c*) As to tickets of work to be delivered to persons employed in the manufacture of *hosiery*, see 8 & 9 Vict. 77 ; and to *silk weavers*, 8 & 9 Vict. c. 128, in the Appendix.

(*d*) See these forms in the Appendix.

tress and sale, such sale to take place within such time, not exceeding five days, as the said justice shall think proper, and the overplus, if any, to arise by such sale, to be rendered to the owners of the goods and chattels distrained, and in case it shall appear by any return to such warrant, that no sufficient distress can be readily had, which return may be in the form contained in the schedule to the act annexed,(*d*) or in some other form to the like effect, it shall be lawful for any such justice *as aforesaid, and he is hereby required by warrant under his hand, [*328] according to the form in the schedule to the act annexed,(*e*) or in some other form to the like effect, to commit the person or persons so liable as aforesaid to the common gaol or some house of correction within his or their jurisdiction, there to remain without bail for any time not exceeding three months.

By sect. 25, after reciting that cases may occur where the recovery of such sum or sums of money by distress and sale of the goods and chattels of the defaulter, may appear to the justice or justices of the peace by whom the warrant is to be issued to be attended with consequences ruinous, or in an especial manner injurious to the defaulter and his family; to prevent such consequences it is enacted, that the said justice or justices, in all such cases, shall withhold such warrant and commit the defaulter to the common gaol or some house of correction within his or their jurisdiction, there to remain without bail for any time not exceeding three months, such commitment to be in the form or to the effect of the form in the schedule to this act annexed.(*e*)

By sect. 26 it is enacted, That where any person shall be committed to prison for refusing or delaying to fulfil an award as aforesaid, and such person shall, at any time during the period of his or her imprisonment, pay to the governor or keeper of the prison the full amount of the sum awarded, with all reasonable expenses incurred through such refusal or delay, it shall be lawful for such governor or keeper of such prison, and he is hereby required forthwith to discharge such person from his custody.

27. That the justice or justices by whom any person or persons shall be committed to prison for not appearing as a witness or not submitting to be examined, shall cause the warrant or order for such commitment to be drawn up in the form or to the effect set forth in the schedule to the act.(*e*)

28. That no appeal or certiorari shall lie against any proceedings under this act.

29. That no proceeding under this act shall be invalid for want of form.

Sec. 30 provides a table of fees to be taken for proceedings under the act, and enacts that a table of *fees,(*f*) signed by the clerk to the justices, shall be hung up in every place where any general [*329]

(*d*) See these forms in the Appendix. (*e*) See the form in the Appendix.

(*f*) The following is the Table of Fees:

To the Clerk of the Justice or Justices.	*s.*	*d.*
For each summons	0	2
For every oath or affirmation	0	3
For drawing and entering the order	0	4
For every warrant	0	6

or quarter sessions, or petty or other sessions of the peace shall be held.

Section 31 enacts, that all costs, time and expenses attending the application to justices to be made under this act, and of the arbitration pursuant thereon, shall be settled by the arbitrators or arbitrator by whom such dispute shall be settled; and where the same shall be determined by any justice of the peace pursuant to this act, then the costs, time, and expenses aforesaid shall be settled by such justice: and where the arbitrators, appointed as aforesaid, cannot agree as to the costs, time, and expenses to be allowed, the same shall be settled by the justice or justices of the peace by whom the said arbitrators were named, and in case of his absence or indisposition, by any justice of the peace for the same county, stewartry, riding, division, barony, city, burgh, liberty, town or place nearest to the place at which the arbitrators met to settle the dispute: provided always that no master manufacturer, his foreman or agent shall in any case be allowed for costs, time, or expenses by the said justice or justices, unless it shall appear to him or them that the proceedings of the workmen were vexatious and oppressive.

32. Provided that every agreement, submission, award, ticket, matter or thing under and by virtue of this act, or relating to any other mode of arbitration as aforesaid, shall and may be drawn up and written upon unstamped paper.

33. Provided also, that no action shall be brought against any arbitrator, justice of the peace, constable, headborough, or other officer, or against any other person *or persons whomsoever, for any matter [*330] or thing whatsoever done or committed under or by virtue or in the execution of this act, unless such action shall be brought within six calendar months next after the doing or committing of such matter or thing.

34. Provided also, that if any action or suit shall hereafter be commenced or prosecuted against any person or persons for any thing done under, by virtue, or in the execution of this act, such person or persons may plead the general issue, and give this act and the special matter in evidence, and if the plaintiff shall become non-suited, or suffer discontinuance, or forbear further prosecution, or if judgment shall be given for the defendant or defendants, such defendant or defendants shall recover his, her or their full costs, and for which he, she, or they, shall have like remedy, as in cases where costs by law are given to defendants.

35. Provided always, that nothing in this act contained shall extend or be construed to extend to repeal, abridge, annul, or make void any of the clauses, provisions, remedies, or powers contained in any law or statute now in force, and not repealed by this act.

To the Constable or other Police Officer.	*s.*	*d.*
For service of summons or order	0	4
For executing warrant of distress and sale of goods	1	0
For custody of goods distrained, per diem	0	3
For every mile he shall travel	0	3
For every caption	0	6

*CHAPTER X. [*331]

COMBINATION AMONGST MASTERS AND WORKMEN.(1)

The statute 6 Geo. 4, c. 129 331
Observations thereon 337
Conspiracies amongst Masters and Workmen, &c. 340

A GREAT variety of statutes formerly existed relative to the combination of workmen. Those statutes, however, where all repealed by the 5 Geo. 4, c. 95, which substituted other provisions in lieu thereof, "for the purpose of protecting the free employment of capital and labour, and for punishing combinations interfering with such freedom by means of violence, threats, or intimidation." The provisions of that statute not being found effectual, another act was passed in the following year, 6 Geo. 4, c. 129, which now regulates the law upon the subject.

6 GEO. 4, c. 129.

Sect. 1 recites 5 Geo. 5, c. 95, and that it had not been found effectual and, further, that "such combinations are injurious to trade and commerce, dangerous to the tranquillity of the country, and especially prejudicial to the interests of all who are concerned in them," and that "it is expedient to make further provision as well for the security and personal freedom of individual workmen in the disposal of their skill and labour, as for the security of the property and persons of masters and employers, and for that purpose to repeal the said act and to enact other provisions and regulations in lieu thereof;" and then repeals 5 Geo. 4, c. 95.

*By sect. 2 a large number of previous acts are also repealed. [*332]

By sect. 3 it is enacted, that if any person shall by violence to the person or property, or by threats, or intimidation, or by molesting, or in any way obstructing another, force or endeavour to force any journeyman manufacturer, workman, or other person hired or employed in any manufacture, trade or business, to depart from his hiring, employment or work, or to return his work before the same shall be finished, or prevent or endeavour to prevent any journeyman manufacturer, workman, or other person not being hired or employed, from hiring himself to, or from accepting work or employment from any person or persons, or if any person shall use or employ violence to the person or property of another, or threats, or intimidation, or shall molest, or in any way obstruct another

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(1) See Wharton's Criminal Law p. 688, 689. 2 ed. 1852, where all the American cases will be found.

for the purpose of forcing or inducing such person to belong to any club or association, or to contribute to any common fund, or to pay any fine or penalty, or on account of his not belonging to any particular club or association, or not having contributed, or having refused to contribute to any common fund, or to pay any fine or penalty, or on account of his not having complied or of his refusing to comply with any rules, orders, resolutions, or regulations made to obtain an advance or to reduce the rate of wages, or to lessen or alter the hours of working, or to decrease or alter the quantity of work, or to regulate the mode of carrying on any manufacture, trade or business, or the management thereof; or if any person shall by violence to the person or property of another, or by threats, or intimidation, or by molesting, or in any way obstructing another, force or endeavour to force any manufacturer or person carrying on any trade or business to make any alteration in his mode of regulating, managing, conducting, or carrying on such manufacture, trade, or business, or to limit the number of his apprentices, or the number or description of his journeymen, workmen, or servants, every person so offending, or aiding, abetting, or assisting therein, being convicted thereof in manner hereinafter mentioned, shall be imprisoned only or shall and may be imprisoned and kept to hard labour for any time not exceeding three calendar months.

4. Provided always, that this act shall not extend to subject any persons to punishment who shall meet together for the sole purpose of consulting upon and determining *the rate of wages or prices which [*333] the persons present at such meeting, or any of them, shall require or demand for his or their work, or the hours or time for which he or they shall work in any manufacture, trade or business, or who shall enter into any agreement, verbal or written, among themselves for the purpose of fixing the rate of wages or prices which the parties entering into such agreement, or any of them, shall require or demand for his or their work, or the hours of time for which he or they will work in any manufacture, trade or business, and that persons so meeting for the purposes aforesaid, or entering into any such agreement as aforesaid, shall not be liable to any prosecution or penalty for so doing, any law or statute to the contrary notwithstanding.

5. Provided also, that this act shall not extend to subject any persons to punishment who shall meet together for the sole purpose of consulting upon and determining the rate of wages or prices which the persons present at such meeting, or any of them, shall pay to his or their journeymen, workmen or servants for their work, or the hours or time of working in any manufacture, trade or business, or who shall enter into any agreement, verbal or written, among themselves for the purpose of fixing the rate of wages or prices which the parties entering into such agreement, or any of them, shall pay to his or their journeymen, workmen or servants, for their work, or the hours or time of working in any manufacture, trade or business, and that persons so meeting for the purposes aforesaid, or entering into any such agreement as aforesaid, shall not be liable to any prosecution or penalty for so doing, any law or statute to the contrary notwithstanding.

By sect. 6 it is enacted, that all and every persons and person who

shall or may offend against this act shall and may, equally with all other persons, be called upon and compelled to give his or her testimony and evidence as a witness or witnesses on behalf of his majesty, or of the prosecutor or informer, upon any information to be made or exhibited under this act against any other person or persons not being such witness or witnesses as aforesaid, and that in all such causes every person having given his or her testimony or evidence as aforesaid, shall be, and is hereby indemnified of, from, and against any information to be laid, or prosecution to be commenced against him or her for having offended in the matter *wherein or relative to which he, she, or they shall have [*334] given testimony or evidence as aforesaid.

7. And for the more effectually enforcing and carrying into execution the provisions of this act, it is enacted, that on complaint and information on oath before any one or more justice or justices of the peace of any offence having been committed against this act, within his or their respective jurisdictions, and within six calendar months before such complaint or information shall be made, such justice or justices are hereby authorized and required to summon the person or persons charged with being an offender or offenders against this act to appear before any two(*a*) such justices, at a certain time or place to be specified; and if any person or persons so summoned shall not appear according to such summons, then such justices (proof on oath having been first made before them of the due service of such summons upon such person or persons, by delivering the same to him or them personally, or leaving the same at his or their usual place of abode, provided the same shall be so left twenty-four hours at the least before the time which shall be appointed to attend the said justices upon such summons,) shall make and issue their warrant or warrants for apprehending the person or persons so summoned and not appearing as aforesaid, and bringing him or them before such justices, or it shall be lawful for such justices, if they shall think fit, without issuing the same upon such complaint and information as aforesad, to make and issue their warrant or warrants for apprehending the person or persons by such information charged to have offended against this act, and bringing him or them before such justices, and upon the person or persons complained against appearing upon such summons, or being brought, by virtue of such warrant or warrants, before such justices, or upon proof on oath of such person or persons absconding, so that such warrant or warrants cannot be executed, then such justices shall, and they are hereby authorized and required forthwith to make inquiry touching the matters complained of, and *to examine into the same, by the oath or oaths of any one or more credible person or persons as shall be requisite, and to hear [*335] and determine the matter of every such complaint, and upon confession by the party, or proof by one or more credible witness or witnesses upon oath to convict or acquit the party or parties against whom complaint shall have been made as aforesaid

8. That it shall be lawful for the justices of the peace before whom any

(*a*) Or *one* metropolitan police magistrate. See 2 & 3 Vict. c. 71, s. 14. See Reg. v. St. George, Bloomsbury, 20 L, J., N. S., M. C., 200, or two other justices having jurisdiction within the district; 3 & 4 Vict. c. 84, s. 6; and see 11 & 12 Vict. c. 43, s. 33.

such complaint and information shall be made as aforesaid, and they are hereby authorized and required, at the request in writing of any of the parties, to issue his or their summons to any witness or witnesses to appear and give evidence before such justices at the time and place appointed for hearing and determining such complaint, and which time and place shall be specified in such summons; and if any person or persons so summoned to appear as a witness or witnesses as aforesaid, shall not appear before such justices at the time and place specified in such summons, or offer some reasonable excuse for the default, or, appearing according to such summons, shall not submit to be examined as a witness or witnesses, and give his or their evidence before such justices touching the matter of such complaint, then and in every such case it shall be lawful for such justices, and they are hereby authorized, (proof on oath, in the case of any person not appearing according to such summons, having been first made before such justice of the peace of the due service of such summons on every such person, by delivering the same to him or her, or by leaving the same, twenty-four hours before the time appointed for such person to appear before such justices, at the usual place of abode of such person,) by warrant under the hands of such justices, to commit such person or persons so making default in appearing, or appearing and refusing to give evidence, to some prison within the jurisdiction of such justices, there to remain, without bail or mainprize, for three calendar months, or until such person or persons shall submit to be examined and give evidence before such justices as aforesaid.(*b*)

[*336] *9. That the justices before whom any person or persons shall be convicted of any offence against this act, or by whom any person shall be committed to prison for not appearing as a witness, or not submitting to be examined, shall cause all such convictions and the warrants or orders of such commitments, to be drawn up in the form(*c*) or to the effect set forth in the schedule to this act annexed.

10. That the justices before whom such conviction shall be had, shall cause the same (drawn up in the form or to the effect hereinbefore directed,) to be fairly written on parchment and transmitted to the next general quarter sessions of the peace, to be holden for the county, riding, division, city, liberty, town, or place wherein such conviction was had, to to be filed amongst the records of the said general sessions or general quarter sessions, and in case any person or persons shall appeal, in manner hereinafter mentioned, from the judgment of the said justices to the said general sessions or general quarter sessions, the justices in such general sessions or general quarter sessions are hereby required, upon receiving such conviction, to proceed to the hearing and determination of the matter of the appeal according to the directions of this act.

11. Provided always, that in Scotland all prosecutions under this act

(*b*) Upon an indictment for conspiracy to commit the acts prohibited by this statute the penalties of a misdemeanor, fine and imprisonment, would attach; and the Court would not be confined to awarding three months' imprisonment as provided by this sect. See Reg. v. Rowlands, Q. B. Mich. Term, 1851.

(*c*) See the form in the Appendix; and see also the forms given in the Schedule to 11 & 12 Vict. c. 43, s. 32, the use of which, however, is not obligatory.

may be insisted on at the instance of the public prosecutor, and may be judged of either by two justices of the peace, or by the sheriff of the county within which the offences may have been committed.

12. Provided always, that if any person convicted of any offence or offences punishable by this act, shall think himself or herself aggrieved by the judgment of such justices before whom he or she shall have been convicted, such person shall have liberty to appeal from every such conviction to the next court of general sessions, or general quarter sessions of the peace, which shall be held for the county, riding, division, city, liberty, town, or place wherein such offence was committed, and that the execution of every judgment so appealed from shall be suspended in case the person so convicted shall **immediately*(*d*) enter into recognizances before such justices, (which they are hereby authorized and required to take,) himself in the penal sum of ten pounds, with two sufficient sureties in the penal sum of ten pounds of lawful money of Great Britain, upon condition to prosecute such appeal with effect, and to be forthcoming to abide the judgment and determination of the said next general sessions or general quarter sessions, and to pay such costs as the said Court shall award on such occasion; and the justices in the said next Court of general sessions or general quarter sessions, are hereby authorized and required to hear and determine the matter of the said appeal, and to award such costs as to them shall appear just and reasonable to be paid by either party, which decision shall be final; and if, upon hearing the said appeal, the judgment of the justices, before whom the appellant shall have been convicted, shall be affirmed, such appellant shall immediately be committed by the said Court to the common gaol or house of correction, without bail or mainprize, according to such conviction, and for the space of time therein mentioned. [*337]

13. Provided also, that no justice of the peace, being also a master in the particular trade or manufacture in or concerning which any offence is charged to have been committed under this act, shall act as such justice under this act.

OBSERVATION ON 6 GEO. 4, C. 129.

Since the passing of this act of Parliament, it is *perfectly clear, that a mere combination, either of masters for the purpose of lowering wages,(*e*) or of workmen for the purpose of raising them,(*f*) is quite legal, and so long as such persons content themselves with merely [*338]

(*d*) In Reg. v. Aston, 1 L. M. & P. 491, Wightman, J., held, that this word "immediately," here means "promptly and expeditiously," having regard to all the circumstances of the particular case. In that case the prisoner was convicted on Thursday, at Tunstall, in Staffordshire, and committed to Stafford Gaol, though defended by an attorney, who left the Court before the sentence was pronouced. On the Saturday following, another attorney, who lived at Manchester, was consulted on his behalf, and that attorney on the Monday applied to the justices (who did not sit on Saturday) to be allowed to enter into recognizances as required by the act. After time taken to consider the matter, they refused the application; but Wightman, J., thought it ought to have been granted; and made absolute a rule (which had been granted under 11 & 12 Vict. c. 44, s. 5) ordering the recognizances to be taken.

(*e*) See sect. 5. (*f*) See sect. 4.

combining to effect the object they have in view, they will be guilty of no offence. But if, in order more effectually to attain their object, whether of lowering or raising wages, they proceed to use violence, threats, intimidation, molestation, or obstruction, with a view to *force* others to adopt their views, they will be guilty of an offence against this act of parliament;(*g*) and, as we shall presently see, may also render themselves liable to an indictment for conspiracy.

That the above is the effect of the statute of Geo. 4, will be perceived from the following observations of Tindal, C. J., who, in charging the grand jury at the Stafford Special Commission in 1842,(*h*) whilst alluding to the various charges which would be brought before them arising out of combinations of workmen, observed: "If the workmen of the several collieries and manufactories, who complained that the wages which they received were inadequate to the value of their services, had assembled themselves peaceably together for the purpose of consulting upon and determining the rate of wages or prices which the persons present at the meeting should require for their work, and had entered into an agreement amongst themselves for the purpose of fixing such rate, they would have done no more than the law allowed. A combination for that pur- [*339] pose and to that extent, (if, indeed, it is to be called by that *name), is no more than is recognised as legal by the statute 6 Geo. 4; by which statute also exactly the same right of combination, to the same extent, and no further, is given to the masters when met together, if they are of opinion the rate of wages is too high. In the case supposed—that is, a dispute between the masters and the workmen as to the proper amount of wages to be given,—it was probably thought by the legislature, that if the workmen on the one part refused to work, or the masters on the other refused to employ, as such a state of things could not continue long, it might fairly be expected that the party must ultimately give way whose pretensions were not founded in reason and justice,—the masters if they offered too little, the workmen if they demanded too much. But, unfortunately for themselves and others, those who were discontented did not rest here. Not satisfied with the exercise of their own right to withhold their own labour, if they were discontented with the price they received for it, they assumed the power of interfering with the right which others possessed of exercising their discretion upon the same point; and accordingly you will have numerous cases laid before you, in which large bodies of dissatisfied workmen interfered, by personal violence, and by threats and intimidation, to compel others, who were

(*g*) See sect. 3. Administering an oath not to work under certain prices, and to keep the secrets of a lodge, is administering an unlawful oath within the statutes 37 Geo. 3, c. 123; 39 Geo. 3, c. 79; 52 Geo. 3, c. 104, and 57 Geo. 3, c. 19; not as has been ignorantly supposed, because it has reference to any matter respecting wages, but on the ground that every association of that kind bound together by an oath not to disclose the proceedings of that society, is for that reason, and not for the other, an unlawful combinatinn within the meaning of the statute; Rex v. Ball, 6 C. & P. 563; Rex v. Lovelass, 6 C. & P. 596; S. C. 1 M. & Rob. 349; Rex. v. Dixon, 6 C. & P. 601.

(*h*) See Carr. & M. 662, note. It is thought desirable to give this and the following extract, as the law as to combination is *in practice* not well known or understood at least by workmen.

perfectly willing to continue to labour in their callings at the rate of wages then paid, to desist from their work, to leave the mine or manufactory, and, against their own will, to add themselves to the numbers of the discontented party,—than which a more glaring act of tyranny and despotism by one set of men over their fellows cannot be conceived. If there is one right which, beyond all others, the labourer ought to be able to call his own, it is the right of the exertion of his own personal strength and skill in the full enjoyment of his own free will, altogether unshackled by the control or dictates of his fellow-workmen; yet, strange to say, this very right which the discontented workmen claims for himself to its fullest extent, he does, by a blind perversity and unaccountable selfishness, entirely refuse to his fellows who differ in opinion from himself. It is unnecessary to say that a course of proceeding so utterly unreasonable in itself, so injurious to society, so detrimental to the interests of trade, and so oppressive against the rights of the poor man, must be a gross and flagrant violation of the law, and must be put down, *when the guilt is established, by a proper measure of punishment." [*340]

And similar principles were laid down, on a recent occasion,(*i*) by Patteson, J., in passing sentence upon some prisoners who had been convicted upon an indictment under the statute of Geo. 4. "The object of the legislature," said he, "was that all masters and workmen should be left free in the conduct of their business. The masters were at liberty to give what rate of wages they liked, and to agree among themselves what wages they would pay. In like manner, the workmen were at liberty to agree among themselves for what wages they would work, and were not restricted in so doing by the circumstance that they were in the employ of one or other of the masters. The intention of the legislature was to make them quite free; but seeing that intimidation might be used to carry out such agreements, it was enacted by 6 Geo. 4, c. 129, s. 3,(*k*) that &c., (the learned Judge here read that section, and added) *the offence did not consist in the combination* to raise their wages, *but in the use of threats, intimidation, molestation, and obstruction.*"

CONSPIRACIES, ETC. AMONGST MASTERS AND WORKMEN.

Since the above mentioned statute, 6 Geo. 4, c. 129, it has been held,(*l*) that a combination of workmen for the purpose of dictating to masters what workmen they shall employ, is indictable. And an indictment for conspiring to prevent *the workmen* of J. G. from continuing to work, was held to be supported by evidence of a conspiracy to procure the discharge of *any* of the workmen, as the indictment did not necessarily lay the intent as to *all* the workmen.(*m*)

(*i*) Reg. v. Rowlands, Q. B., Mich. 1851. See this case 21 L. J., N. S., M. C. 81.
(*k*) See the sect., ante, p. 332. (*l*) Rex v. Bykerdyke, 1 Moo. & Rob. 179.
(*m*) Ibid.; and see Rex v. Ferguson, 2 Stark. 489, where an indictment against workmen for conspiring to prevent their masters from taking *any* apprentices, was held to be supported by proof of a conspiracy to prevent their taking *more than a certain number*,—in proportion to the number of journeymen employed.

[*341] *In the recent case of Reg. v. Hewitt,(n) where it appeared that a club of workmen had been formed, and was empowered to inflict fines upon persons who worked for obnoxious masters, and that a person so fined refused to pay, whereupon his fellow-workmen would not work with him, and by that means compelled his master to dismiss him: Lord Campbell, C. J., held such conduct of the men to be illegal.

Moreover, if either masters or servants conspire to effect a reduction or increase of wages by the use of *violence, threats, intimidation, or other unlawful means,* they will be guilty of an illegal act, and may be indicted for such conspiracy. It is not thought necessary further to advert in this place to the law applicable to the crime of conspiracy, as a discussion of it would lead us beyond the proper limits of this work.(o)

It may however, perhaps, with propriety be here stated, that a conspiracy has been defined to be "an agreement for an unlawful purpose, or to effect a lawful purpose by unlawful means."(p) Lord Denman, C. J., in one case(q) said, he thought the antithesis not very correct, and, in another,(r) said the words "at least," should accompany the definition.

Where a party of coalwhippers, having a feeling of ill-will to a coal-lumper who paid less than the usual wages created a mob and riotously went to the house where he kept his pay-table, and cried out that they would murder him, and began to throw stones, brick-bats, &c., and broke windows, and partitions, and part of a wall, and continued after his escape throwing stones at the house till they were compelled to desist [*342] by the *threats of the police: it was held by Gurney, B., that they might be convicted of beginning to demolish, under the statute 7 & 8 Geo. 4, c. 30, s. 8, though their principal object was to injure the lumper, provided it was also their object to demolish the house, either on account of its being used by him or his men, and though they had not any ill-will against the owner of the house personally.(s)

(n) 5 Cox Crim. Con. Cas. 162.

(o) See further on this subject, Russ. on Crimes, by Greaves, bk. 2, ch. 2, p. 674, and Reg v. Kenrick, 5 Q. B. 49; Reg. v. Button, 11 Q. B. 929, where other authorities upon the subject may also be found. See also a learned note to Mr. Justice Coleridge's ed. of Bl. Comm. vol. 4, p. 136, where he explains the confusion which has arisen in many cases from the fallacy of separating the *means* from the *end;* and considering that any means could possibly be lawful, of which the end was unlawful, or, on the other hand, any end lawful, the means to which are unlawful.

(p) Rex v. Jones, 4 B. & Ad. 349; Rex v. Seward, 1 A. & E. 713.

(q) Rex. v. Peck, 9 A. & E. 690.

(r) Reg. v. King, 7 Q. B. 788.

(s) Rex v. Batt, 6 C. & P. 329.

CHAPTER XI. [*343]

LEGACIES TO SERVANTS.

It is thought convenient to collect into a separate Chapter the various decisions on this subject, as the question whether particular individuals are entitled to legacies left to a class of persons as "servants" frequently arises; and the answer to it rather depends upon the words of the will and the intention of the testator in each case, than upon the strict legal construction of the contract into which he has entered with the persons claiming the legacy; for it by no means follows that every person with whom a testator has entered into a contract of hiring and service was an object of his testamentary bounty, although in many cases, a clue to his intention may be found by ascertaining the exact nature of such contracts. For similar reasons, no rule can be laid down which will be applicable to all cases. Each case must depend upon its own particular circumstances. It is, however, of course, necessary that a person claiming to be entitled to a legacy left to each one of a class of persons should be one of that class to whom the legacy is left,—that a person, claiming a legacy as a servant should be a servant, otherwise he cannot be entitled to it. It has, therefore, been held,(*a*) that a person who was not obliged to give up his *whole time* to his master, although in some sense he might be called a servant, was not entitled to a legacy left to servants.

Thus, where(*b*) the Duke of Bolton by his will devised "unto such of my servants as shall be living with me at the time of my death, one year's wages," the Lord Keeper said, "Stewarts of Courts, and such who are not *obliged to spend their *whole time* with their master, but may also serve any other master, are not servants within [*344] the intention of the will; but I will not narrow it to such servants only that lived in the testator's house, or had diet from him."

Upon similar principles it has been held, that a servant to be entitled to a legacy left to "servants," must not be subject to the orders of any other person than the testator; that is, that a person serving the testator under a contract made by the testator with that person's master does not come within the class of persons contemplated by the will, although the testator might in some sense be considered his dominus pro tempore.

Thus, where(*c*) a testator, after bequeathing legacies to two of his servants by name, if in his service at the time of his decease, gave and bequeathed unto all his "other servants" who should be living with him at the time of his decease 50*l.* each, and 10*l.* each for mourning; and by

(*a*) This is in accordance with the decisions on the law of settlement, ante, p. 44.
(*b*) Townsend v. Windham, 2 Vern. 546.
(*c*) Chilcot v. Bromley, 12 Ves. 114; and see Quarman, v. Burnett, 6 M. & W. 499, ante, p. 165.

a codicil revoked the legacies of 50*l.*, and 10*l.* for mourning, to his other servants not particularly named, and made the following bequest,—"To all my other servants, in lieu thereof, the sum of 500*l.* each, and 20*l.* each for mourning:" Sir W. Grant, M. R., held, that a coachman, supplied in the course of business with a carriage and horses hired by the year from a job master, was not entitled to the legacy as a servant within the intent and meaning of the will. The coachman in that case did not board or lodge in the testator's house, but received from him 12*s.* a week as board wages, and a livery with the other male servants, the job master also paying him 9*s.* a week; but the coachman served no other person than the testator, and was returned by him as his coachman under the act imposing a duty on male servants. However, Sir W. Grant observed truly, that the coachman was merely the *subject* of the contract, which was with the job master, not a *party* to it.

But in Howard v. Wilson,(*d*) in a suit of subtraction of legacy, a coachman, a married man, *originally hired by*, and who had lived five years with a testatrix, residing over her stables in town, occasionally accompanying her into the country, where he lived in the house, though, like all her servants on board wages, waiting sometimes *at table [*345] and *remaining with her, though she changed her job master*, was held entitled under a bequest "to each of my servants living with me at the time of my death, 10*l.*;" *although* the testatrix paid a *job master* 200*l* a year, out of which he *paid* the coachman *wages* and board wages (except 3*s.* a week extra in the country,) and found him in liveries; Sir J. Nicholl distinguishing the case from Chilcot v. Bromley.(*e*)

The late of Earl of Leicester, by his will,(*f*) gave "one year's wages in advance to each of my servants in my service at my death, who shall have lived with me five years or upwards, and one half of a year's wages to each of my servants in my service at my death, the said several legacies to my said servants to be in addition to whatever sum may be due to them respectively for wages up to my death; and also an additional sum of 10*l.* to each of my upper servants, and of 5*l.* to each of my under servants respectively, for mourning. And I direct that each of the said legacies expressly given for mourning, and each of the said legacies to my said servants, shall be paid within one calendar month next after my death:" and Knight Bruce, V. C., held it to be perfectly plain, that a farm bailiff, who had lived with the Earl twenty-eight years, at 350*l.* a year, living on the home farm within the park, rent free, the Earl paying all rates and taxes, and who was allowed keep for a cow and horse, and to take pupils to instruct in agriculture, was a servant within the the meaning of the will, and clearly entitled to his year's wages of 350*l.*,(*g*) and interest at 4*l.* per cent. from one month from the testator's decease, the time when the legacy was directed by the will to be paid.

Where(*h*) the Earl of A. by his will, after bequeathing legacies to several

(*d*) 4 Hagg. 107.
(*e*) Ubi supra.
(*f*) 9 Jour. 936.
(*g*) The ten pounds for mourning had been paid.
(*h*) Ogle v. Morgan, 19 L. J., N. S., Ch. Cas. 531; reversed by Lord Truro, L. C. Feb. 18, 1852.

servants by name, bequeathed to each person as a servant in my *domestic establishment* at the time of my decease, a year's wages beyond what shall be due to him or her for wages: Knight Bruce, V. C., held, that a head gardener, at weekly wages, who had formerly resided in a garden house in the middle of the garden, (which had been furnished by the Earl, and all the expenses of which had been defrayed by him, and the *domestic work of which was performed by his domestic servants [*346] and a charwoman paid by him;) but on the Earl wishing to pull down the garden house had removed to another cottage belonging to the Earl in an adjoining village, and who was allowed milk and firewood,—was entitled to the legacy. But Lord Truro, on appeal, reversed that decision, considering that the testator had in view the distinction between *indoor* and *outdoor* servants when he used the term "servants in my domestic establishment."

Moreover, to entitle a servant to a legacy of a year's wages, it has been held that he must have been a *yearly* servant; and a servant who has been paid *weekly* wages is not entitled. Thus where a will contained the following words, "I give to each of my servant's *one year's* wages over and above what may be due to them at the time of my decease," a question was made whether a person who had worked in the testator's garden, under his gardener, for several years, at *weekly wages*, and a boy who had served the testator for some time as a cowboy, at *weekly wages*, and neither of whom resided with or formed part of the testator's family, were to be considered as entitled under the will to a year's wages. But Sir J. Leach, M. R., was of opinion that these persons were not servants in the sense in which the testator had used the expression. In speaking of a year's wages, the testator plainly used that expression with reference to family servants usually hired by the year.(*i*)

And so where(*k*) a testator by his will gave "to each of his servants living with him at his decease, and who had lived with him three years," a legacy of one year's wages: Sir G. Turner, V. C., held, that a head gardener, who at the time of the death of the testator lived in a cottage of the testator in the grounds, free of rent, and was employed at 17*s. a week*, was not entitled to the legacy; and although clearly a servant, and not to be excluded on the ground that he was not living in the same house with the testator, yet the bequest only applied to servants hired *by the year*. He could not impute to the testator that he meant, by a year's wages, the aggregate amount of fifty-two weeks' wages. And as the evidence on the part of the plaintiff *failed to make out that he was [*347] a *yearly* servant, his claim was dismissed with costs.

The servant also must, generally speaking, continue in the service of the testator to the time of his death.

Sir Robert Henley, by will,(*l*) gave 100*l.* apiece to all his servants. The Court declared that none but such as were his servants before the making of the will,(*m*) and did so continue to be servants to him until

(*i*) Booth v Dean, 1 Myl. & K., 560.
(*k*) Blackwell v. Pennant, coram Sir G. Turner, V. C., March 8, 1852.
(*l*) Jones v. Henley, Ch. Rep. 361.
(*m*) The question does not appear to have been raised in any subsequent cases,

the time of his death, could have any pretence to the legacy; and such only as were his menial servants and lived all along in the house with him from the date of the will until his death, and no others.

But where(*n*) a testator bequeathed a legacy to Jane H., "if in his service at the time of his decease," and it appeared that Jane H. had quitted his house a few days before his death, Lord Eldon held, that parol evidence was admissible to show that though she had quitted his *house*, she continued and was considered by him as still in his service; and upon that evidence the legacy was established.

And in the subsequent case of Parker v. Marchant,(*o*) where a testator had several servants, and by a codicil to his will bequeathed to some of them, by name, legacies of 1000*l.* each, and then gave "to the other servants 500*l.* each:" it was held, by Lord Lyndhurst, L. C., (affirming the decision of Knight Bruce, V. C.,) that A. R., a female servant, who was in the testator's service at the date of the codicil, though for ten week's only, and quitted it three years and a half before his death, was entitled to a legacy of 500*l.*, considering that the case of Jones v. Henley(*p*) did not apply. And his lordship said, "The testator had several servants, some of whom had lived in his service for many years, as he states in his codicil. The others lived with him for a shorter period of time. He distinguishes between them. He gives to three of them by name, who had [*348] lived in his service for many *years, 1000*l.* each, and he then expresses himself thus, 'to the other servants 500*l.* each.' What is meant by the other servants? The rest. After taking out of the whole class the three individuals who are named, Mrs. D. and the two others, to whom he gives 1000*l.* each, he then gives 500*l.* to the remainder. It appears to me as if he had named them, and as he annexes no condition to the gift, I am of opinion that A. R. is entitled, on the construction of this codicil, to the legacy of 500*l.*"

Where a man, on his death, left among his papers two letters sealed and directed "for Sarah Gough, my late servant," one of which contained a a promissory note for 400*l.*, and the letter stated that it was "in consideration of her long and faithful services," (she having been his housekeeper, but having left on having a child by him,) and that his executors would pay her the amount of the note; and the other letter was similarly addressed and inclosed a note for 200*l.*, and in the letter there was the following passage, "In addition to any sum I owe you, I enclose you 200*l.* as a mark of my respect," and there was also a recommendation that the money should be invested for the benefit of the child: it was held, that the notes were void as notes for want of delivery in the maker's lifetime, and, therefore, the executors were not liable upon them; and they were also void as testamentary dispositions for non-compliance with the Wills' Act.(*q*)

whether it was necessary that the servant should have been in the service of the testator *at the date of his will*, as well as at the time of his death. See Parker v. Marchant, infra.

(*n*) Herbert v. Reid, 16 Ves. 481.

(*o*) 6 Jur. 292; S. C. 1 Y. & C., N. S. 290; S. C. on appeal, 7 Jur. 457, (the point in the text is not noticed in the Report, 2 Cr. & Ph.)

(*p*) Ubi supra.

(*q*) Gough v. Tindon, 21 L. J., N. S., Exc. 58.

A legacy left by a master to his servant will, sometimes, be considered as a satisfaction, either in the whole or in part, of any wages due at the time of the master's death, unless a contrary intention appear from the master's will. Courts of equity, however, are inclined to infer a contrary intention from slight circumstances. Thus, in Matthews v. Matthews,(*r*) Sir Thomas Clarke, M. R., said he remembered a case, before Lord Hardwicke, where an old lady, indebted to a servant for wages, by will gave ten times as much as she owed or was likely to owe; yet because the legacy was made payable *a month after* her own death, the Court laid hold of that circumstance to take it out of the general rule.

(*r*) 2 Ves. sen. 636. See also Chancey's case, 1 P. Wms. 408. However, in Richardson v. Greese, 3 Atk. 69, Lord Hardwicke said, that legacies to servants had never been held to be in satisfaction of debts.

APPENDIX.

ALPHABETICAL TABLE

SHEWING THE VARIOUS STATUTES APPLICABLE TO WORKMEN, &c. IN PARTICULAR TRADES, &c.; UNDER MANY OF WHICH JURISDICTION IS GIVEN TO MAGISTRATES.(*a*)

Artificers, Handicraftsmen, Miners, Colliers, Keelmen, Pitmen, Glassmen, Potters, Labourers, and Servants in Husbandry.
20 Geo. 2, c. 19, ante, p. 301.
6 Geo. 3, c. 25, ante, p. 305.
4 Geo. 4, c. 34, ante, p. 308.

Bargemen, Lightermen, Watermen, Ballastmen (except Trinity Ballastmen,) *Coalwhippers, Coal Porters, Sailors, Lumpers, Riggers, Shipwrights, Caulkers,* or other labourers who work for hire in and upon the River Thames, or the docks, creeks, wharfs, quays, or places adjacent, not being in the city of London or the liberties thereof, and the Owners, Masters, or Commanders of Vessels, or their Agents, on the said river, or the docks or creeks thereunto adjoining, or the Owners, Wharfingers, or Occupiers of such wharfs or quays, or their Agents or other Employers; respecting wages or money due to such labourers for work or loss of time, whether the same persons be employed for any certain time or in any other manner.
2 & 3 Vict. c. 71, s. 37.

**Ballastmen* (except Trinity Ballastmen.) See *Bargemen.* [*350]

Bone and Thread Lace Manufacturers.
19 Geo. 3, c. 49, ss. 3, 4 (Rest repealed by 1 & 2 Wm. 4, c. 36.)

Boot and Shoemakers. See *Leather* and *Shoemakers.*

Breeches Makers. See *Leather* and *Tailors.*

(*a*) The Truck Act, 1 & 2 Wm. 4, c. 37, post, p. 411, applies to most trades. See sect. 19.

Calico Printers.
6 Geo. 3, c. 25, ante, p. 305.
4 Geo. 4, c. 34, ante, p. 308.
Capmakers. See *Hatmakers.*
Caulkers. See *Bargemen.*
Chimneysweeps. 3 & 4 Vict. c. 85, ante, p. 8, note(*r*).
Clock and Watchmakers. 27 Geo. 2, c. 7.
Clothiers.
7 Jac. 1, c. 7.
14 Geo. 3, c. 25;
And see *Woollen Manufacturers.*
Coal Porters. } See *Bargemen.*
Coalwhippers. }
Colliers. See *Artificers, Miners,* and 40 Geo. 3, c. 77 (except sects. 1 and 5, which were repealed by 7 & 8 Geo. 4, c. 27, and other provisions substituted by) 7 & 8 Geo. 4, c. 29, s. 37, and c. 30, s. 6.
Cotton Manufactories. See *Factories, Hosiery* and
1 Ann. st. 2, c. 18 (made perpetual by 9 Ann. c. 30.)
13 Geo. 2, c. 8.
22 Geo. 2, c. 27. See Appendix, p. 366.
14 Geo. 3, c. 44.
17 Geo. 3, c. 56. See Appendix, p. 381.
Dyers and Hotpressers.
22 Geo. 2, c. 27. See Appendix, p. 366, (sect. 12 was partly repealed by 6 Geo. 4, c. 129, ante p. 331, and 9 Geo. 4, c. 31; and as to wages by 1 & 2 Wm. 4, c. 36, see c. 37, post, p. 411.)
17 Geo. 3, c. 56. See sect. 17, Appendix, p. 394. (This act was not repealed as to Dyers by 6 & 7 Vict. c. 40, Appendix, p. 447. See Reg. v. Button, 11 Q, B. 941.)
Factories.
42 Geo. 3, c. 73. Appendix, p. 400.
3 & 4 Wm. 4, c. 103. Appendix, p. 424.
4 & 5 Wm. 4, c. 1. Appendix, p. 426, note.
7 & 8 Vict. c. 15. Appendix, p. 463.
10 & 11 Vict. c. 29. Appendix, p. 538.
13 & 14 Vict. c. 54. Appendix, p. 544.
[*351] **Felt.* See *Hatmakers.*
Flax.
22 Geo. 2, c. 27. Appendix, p. 366.
14 Geo. 3, c. 44.
17 Geo. 3, c. 56. Appendix, p. 381.
And see *Factories, Hosiery, Ropeworks.*
Fur. } 22 Geo. 2, c. 27. Appendix, p. 366.
Fustian. } 17 Geo. 3, c. 56. Appendix, p. 381.
Glassmen. See *Artificers.*
Glovemakers. See *Hosiery* and *Leather.*
Hair. See *Mohair.*
Handicraftsmen. See *Artificers.*

Hatmakers.

22 Geo. 2, c. 27. Appendix, p. 366.
17 Geo. 3, c. 11.
17 Geo. 3, c. 55 (as to sects. 3 and 4, see 6 Geo. 4, c. 129. ante, p. 331.)
17 Geo. 3, c. 56 Appendix, p. 381.

Hemp, Manufacturers of Hemp mixed with Wool, Fur, Flax, Mohair, or Silk.

22 Geo. 2, c. 27. Appendix, p. 366.
14 Geo. 3, c. 44.
17 Geo. 3, c. 56. Appendix, p. 381.
And see *Factories, Hosiery, Ropeworks.*

Hosiery. Persons engaged in the manufacture of woollen, worsted, linen, cotton, flax, mohair, or silk materials in, on, or by stocking frame, warp machine, or any other machine employed in the manufacture of framework, knitted, or looped fabrics, and every trade, occupation, operation, or employment whatsoever connected with or incidental to the manufacture of stockings, gloves, and other articles of hosiery.

6 & 7 Vict. c. 40. Appendix, p. 447.
Tickets of work (pursuant to 5 Geo. 4, c. 96, s. 18,) 8 & 9 Vict. c. 77. Appendix, p. 531.

Hotpressers. See *Dyers.*

Husbandry, Servants in. See *Artificers.*

Note.—1 & 2 Wm. 4, c. 37, does *not* apply to servants in husbandry: see sect. 20, post, p. 419.

Iron.

22 Geo. 2. c. 27, Appendix, p. 366.
17 Geo. 3, c. 56, Appendix, p. 381.

Japanned Goods.

1 & 2 Wm. 4, c. 37, Appendix, p. 411.

Jute. See *Ropeworks.*

**Keelmen* } See *Artificers, Bargemen.* [*352]
Labourers }

Lace. See *Bone and Thread Lace Manufacturers.*

Leather— Manufacturers of Leather Breeches, Gloves, &c.

1 Ann. stat. 2, c. 18, made perpetual, 9 Ann. c. 30.
13 Geo. 2, c. 8, s. 4.
22 Geo. 2, c. 27, Appendix, p. 366.
17 Geo. 3, c. 56, Appendix, p. 381.

Lightermen. See *Bargemen.*

Linen.

22 Geo. 2, c. 27, Appendix, p. 366.
14 Geo. 3 c. 44,
15 Geo. 3, c. 14.
17 Geo. 3, c. 56, Appendix, p. 381.
22 Geo. 3, c. 40.
6 & 7 Vict. c. 40, Appendix, p. 447.
And see *Factory, Hosiery.*

Lumpers. See *Bargemen.*

Mills. See *Factory, Silk.*
Miners. See *Artificers, Colliers.*
As to *Women* and *Children* employed in Mines, 5 & 6 Vict. c. 99, Appendix, p. 440.
——— *in Cornwall.* 2 & 3 Vict. c. 58, s. 1.
Mohair. See *Hemp, Hosiery, Linen.*
Papermakers.
36 Geo. 4, c. 111, was repealed, 6 Geo. 4, c. 129.
Pitmen. See *Artificers, Colliers, Miners, Tinmen.*
Potters. See *Artificers.*
Printworks, Employment of Women and Children in.
8 & 9 Vict. c. 29, Appendix, p. 505.
9 & 10 Vict. c. 18, Appendix, p. 513, note(*n*)
10 & 11 Vict. c. 70, Appendix, p. 540.
Riggers. See *Bargemen.*
Ropeworks. Certain Ropeworks declared not to be within the Factory Acts.
9 & 10 Vict. c. 40, Appendix, p. 463 note.
Sailors, *Shipwrights* } See *Bargemen.*
Shoemakers, Journeymen.
9 Geo. 1, c. 27.
[*353] **Silk.* See *Factory, Hosiery*, and,
14 & 15 Car. 2, c. 15
20 Car. 2, c. 6
8 & 9 Wm. 3. c. 36 } as to Throwers, Winders and Doublers.
(The 13 Geo. 3, c. 68; 32 Geo. 3, c. 44, and 51 Geo. 3, c. 7, were repealed, 5 Geo. 4, c. 66.)
22 Geo. 2, c. 27, Appendix, p. 366.
14 Geo. 3, c. 44.
17 Geo. 3, c. 56, Appendix, p. 281.
—— *Weaver's Ticket of Work* (pursuant to 5 Geo. 4, c. 97, s. 18.)
8 & 9 Vict. c. 128, Appendix, p. 535.
Steel. See *Iron.*
Stockings. See *Hosiery.*
Tailors. 7 Geo. 1, stat. 1, c. 12, ss. 4, 6, 9, 10. Rest repealed, 6 Geo. 4, c. 129.
Tinners in Stannaries.
20 Geo. 2, c. 19, ante, p. 301. (See 27 Geo. 2, c. 6.)
4 Geo. 4, c. 34, ante, p. 308.
Tow. See *Hemp and Ropeworks.*
Watchmakers. See *Clockmakers.*
Watermen, Thames. See *Bargemen.*
Woollen and Worsted Manufactures. See *Clothiers, Factory, Hosiery.*
12 Geo. 1, c. 34, ss. 2 and 5.
13 Geo. 1, c. 23, was repealed, 3 & 5 Wm. 4, c. 28.)
22 Geo. 2, c. 27, Appendix, p. 366.
14 Geo. 3, c. 44.
15 Geo. 3, c. 14.

17 Geo. 3, c. 11. In the counties of York, Lancaster, and Cheshire.
17 Geo. 3, c. 56, Appendix, p. 381.
22 Geo. 3, c. 40.

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*5 Eliz. c. 4 (a). [*354]

An Act containing divers Orders for Artificers, Labourers, Servants of Husbandry, and Apprentices.

Although there remain and stand in force presently a great number of acts and statutes concerning the retaining, departing, wages and orders of apprentices, servants and labourers as well in husbandry as in divers other arts, mysteries and occupations, yet partly for the imperfection and contrariety that is found, and doth appear in sundry of the said laws, and for the variety and number of them, and chiefly for that the wages and allowances limited and rated in many of the said statutes, are in divers places too small and not answerable to this time, respecting the advancement of prices of all things belonging to said servants and labourers; the said laws cannot conveniently, without the great grief and burden of the poor labourer and hired man, be put in good and due execution: and as the said several acts and statutes were at the time of the making of them thought to be very good and beneficial to the commonwealth of this realm (as divers of them are,) so if the substance of as many of the said laws as are meet to be continued, shall be digested and reduced into one sole law and statute, and in the same an uniform order prescribed and limited concerning the wages and other orders for apprentices, servants and labourers, there is good hope that it will come to pass that the same law (being duly executed) should banish idleness, advance husbandry, and yield unto the hired person, both in the time of scarcity and in the time of plenty, a convenient proportion of wages.

2. Be it therefore enacted by the authority of this present parliament, that as much of all the estatutes heretofore made, and every branch of them, as touch or concern the king, keeping, departing, working, wages, or order of servants, workmen, artificers, apprentices and labourers, or any of them, and the penalties and forfeitures concerning the same, shall be, from and after the last day of September next ensuing, repealed and utterly void and of none effect; and that all the statutes and every branch thereof or any matter contained in them and not repealed by this statute shall remain and be in full force and effect, anything in this statute to the contrary notwithstanding.

3. And be it further enacted, by the authority aforesaid, that no man-

(a) This Statute is copied from Pickering's Statutes at Large.

ner of person or persons, after the aforesaid last day of September, now next ensuing, shall retain, hire or take into service, or cause to be retained, hired or taken into service, nor any person shall be retained, hired or [*355] taken into service, by any *means or colour to work for any less time or term than for one whole year in any of the sciences, crafts, mysteries, or arts of *clothiers, woollen cloth weavers, tuckers, fullers, clothworkers, sheremen, dyers,*(*b*) hosiers, tailors, shoemakers, tanners, pewterers, bakers, brewers, glovers, cutlers, smiths, farriers, curriers, sadlers, spurriers, turners, cappers, hatmakers, or feltmakers, bowyers, fletchers, arrowheadmakers, butchers, cooks or millers.

4. And be it further enacted, that every person being unmarried, and every other person being under the age of thirty years, that after the feast of Easter next shall marry, and having been brought up in any of the said arts, crafts, or sciences, or that hath used or exercised any of them by the space of three years or more, and not having lands, tenements, rents, or hereditaments copyhold or freehold of an estate of inheritance, or for term of any life or lives of the clear yearly value of forty shillings, nor being worth of his own goods the clear value of ten pounds, and so allowed by two justices of the peace of the county where he hath most commonly inhabited by the space of one whole year, and under their hands and seals, or by the mayor or other head officer of the city, borough, or town corporate where such person hath most commonly dwelt by the space of one whole year, and two aldermen or two other discreet burgesses of the same city, borough, or town corporate, if there be no aldermen, under their hands and seals, nor being retained with any person in husbandry or in any of the aforesaid arts and sciences(*b*) according to this statute, nor lawfully retained in any other art or science, nor being lawfully retained in household, or in any office with any nobleman, gentleman, or others, according to the laws of the realm, nor having a convenient farm or other holding in tillage whereupon he may employ his labour, shall, during the time that he or they shall be so unmarried, or under the said age of thirty years, upon request made by any person using the art or mystery wherein the said person so required hath been exercised (as is aforesaid,) be retained, and shall not refuse to serve according to the tenor of this statute upon the pain and penalty hereafter mentioned.

5. And be it further enacted, that no person which shall retain any servant shall put away his or her said servant, and that no person retained according to the statute shall depart from his master, mistress, or dame before the end of his or her term, upon the pain hereafter mentioned, unless it be for some reasonable and sufficient cause or matter, to be allowed before two justices of the peace, or one at the least within the said county, or before the mayor or other chief officer of the city, borough or [*356] town corporate wherein the said master, mistress or dame *inhabiteth, to whom any of the parties grieved shall complain,

(*b*) Sections 3 & 4 are repealed as to the trades, printed in *italics*, and dyers of wool or woollen cloth by 49 Geo. 3, c. 109, s. 2.

which said justices, or justice, mayor or chief officer, shall have and take upon them or him the hearing and ordering of the matter betwixt the said master, or mistress or dame and servant according to the equity of the cause.(*d*)

6. And that no such master, mistress or dame shall put away any such servant at the end of his term, or that any such servant shall depart from his said master, mistress or dame at the end of his term without one quarter's warning given before the end of his said term, either by the said master, mistress or dame or servant the one to the other, upon the pain hereafter ensuing.

7. And be it further enacted, by the authority aforesaid, that every person between the age of twelve years and the age of sixty years, not being lawfully retained nor apprentice with any fisherman or mariner haunting the seas, nor being in service with any kidder or carrier of any corn, grain or meal for provision of the city of London, nor with any husbandman in husbandry, nor in any city, town corporate or market town, in any of the arts or sciences limited or appointed by this estatute to have or take apprentices, nor being retained by the year or half the year at least for the digging, seeking finding, getting, melting, fining, working, trying, making of any silver, tin, lead, iron, copper, stone, sea-coal, stone-coal, moor-coal, or cherk-coal, nor being occupied in or about the making of any glass, nor being a gentleman born, nor being a student or scholar in any of the universities or in any school, nor having lends, tenements, rents or hereditaments for term of life, or of one estate of inheritance of the clear yearly value of forty shillings, nor being worth in goods and chattels to the value of ten pounds, nor having a father or mother then living, or other ancestor whose heir apparent he is then having lands, tenements or hereditaments of the yearly value of ten pound or above, or goods or chattels of the value of forty pound, nor being a necessary or convenient officer or servant lawfully retained as is aforesaid, nor having a convenient farm or holding whereupon he may or shall employ his labour, nor being otherwise lawfully retained according to the true meaning of the estatute, shall after the aforesaid last day of September, now next ensuing, by virtue of this estatute, be compelled to be retained to serve in husbandry by the year with any person that keepeth husbandry and will require any such person so to serve within the same shire where he shall be so required.

8. And be it further enacted, by the authority of this present Parliament, that if any person after he hath retained any servant shall put away the same servant before the end of his term, unless it be for some reasonable and sufficient excuse to be allowed *as is aforesaid, or if any such master, mistress or dame shall put away any [*357] such servant at the end of his term without one quarter's warning given before the said end as is above remembered, that then every such master, mistress or dame so offending, unless he or they be able to prove by two such sufficient witnesses such reasonable and sufficient cause of putting away of their servant or servants during their term or a quar-

(*d*) And see further, ante, Ch. 9, and cases there cited as to form of the order.

ter's warning given before the end of the said term as is aforesaid before the justices of oyer and terminer, justices of assize, justices of peace in the quarter sessions, or before the mayor or other head officer of any city, borough or town corporate, and two aldermen or two other discreet burgesses of the same city, borough or town corporate if there be no aldermen, or before the Lord President and council established in the marches of Wales, or before the Lord President and council for the time being established in the north parts, shall forfeit the sum of forty shillings.

9. And if any servant retained, according to the form of this estatute, depart from his master, mistress, or dame's service before the end of his term, unless it be for some reasonable and sufficient cause to be allowed as is aforesaid, or if any servant at the end of his term depart from his said master, mistress, or dame's service without one quarter's warning, given before the end of his said term, in form aforesaid, and before two lawful witnesses, or if any person or persons compellable and bounden to be retained and to serve in husbandry, or in any other the arts, sciences or mysteries above remembered, by the year or otherwise, do (upon request made) refuse to serve for the wages that shall be limited, rated, and appointed according to the form of this statute, or promise or covenant to serve and do not serve according to the tenor of the same, that then every servant so departing away, and every person so refusing to serve for such wages, upon complaint thereof made by the master, mistress, or dame of the said servant, or by the party to or with whom the said refusal is made, or promise not kept, to two justices of the peace of the county, or to the mayor or other head officer of the city, borough, or town corporate, and two aldermen, or two other discreet burgesses of the same city, borough, or town corporate, if there be no alderman where the said master, mistress or dame, or the said party to, or with whom the said refusal is made and promise not kept dwelleth, or to either of the said lords presidents, and council of Wales and the North, the said justices, lords presidents and councils, and also the said mayors or other head officers, and other persons of cities, boroughs, or towns corporate, or any of them, as is aforesaid, shall have power, by force of this statute, to hear and examine the matter, and finding the said servant, or the said party so refusing faulty in the premises upon such proofs and good matter as to their discretions shall be thought sufficient to commit him or them to [*358] ward, there to remain without bail or *mainprise until the said servant or party so offending shall be bound to the party to whom the offence shall be made to serve and continue with him for the wages that then shall be limited and appointed according to the tenor and form of this estatute, and to be discharged upon his delivery without paying any fee to the gaoler where he or they shall be so imprisoned.(*e*)

10. And be it likewise enacted by the authority aforesaid, that none of the said retained persons in husbandry, or in any the arts or sciences above remembered, after the time of his retainer expired, shall depart forth of one city, town, or parish to another, nor out of the lath, rape,

(*e*) See further, ante, Ch. 9.

wapentake, or hundred, nor out of the county or shire where he last served to serve in any other city, town corporate, lath, rape, wapentake, hundred, shire or county, unless he have a testimonial under the seal of the said city or town corporate, or of the constable or constables, or other head officer or officers, and of two other honest householders of the city, town, or parish where he last served, declaring his lawful departure, and the name of the shire and place where he dwelled last before his departure, according to the form hereafter expressed in this act, which certificate or testimonial shall be written and delivered unto the said servant, and also registered by the parson, vicar, or curate of the parish where such master, mistress, or dame doth or shall dwell, taking for the doing thereof twopence, and not above, and the form thereof shall be as followeth :—

Memorandum,—That A. B., late servant to C. D., of E., husbandman or tailor, &c., in the county, &c., is licensed to depart from his said master, and is at his liberty to serve elsewhere, according to the statute in that case made and provided. In witness whereof, &c. Dated the day, month, year and place, &c., of the making thereof.

11. And be it further enacted by the authority aforesaid, that no person or persons that shall depart out of a service shall be retained or accepted into any other service without showing before his retainer such testimonial, as is above remembered, to the chief officer of the town corporate, and in every other town and place to the constable, curate, churchwarden, or other head officer of the same where he shall be retained to serve, upon the pain that every such servant so departing without such certificate or testimonial, shall be imprisoned until he procure a testimonial or certificate, the which if he cannot do within the space of one-and-twenty days next after the first day of his imprisonment, then the said person to be whipped and used as a vagabond, according to the laws in such cases provided, and that every person retaining any such servant without showing such testimonial or certificate as is aforesaid, shall forfeit for every such *offence five pounds, and if any such person shall be taken with any counterfeit or forged testimonial, then to be [*359] whipped as a vagabond.

12. And be it further enacted by the authority aforesaid, that all artificers and labourers, being hired for wages by the day or week, shall, betwixt the midst of the months of March and September, be and continue at their work, at or before five of the clock in the morning, and continue at work, and not depart until betwixt seven and eight of the clock at night (except it be in the time of breakfast, dinner, or drinking, the which times at the most shall not exceed above two hours and a half in a day, that is to say, at every drinking one half hour, for his dinner one hour, and for his sleep, when he is allowed to sleep, the which is from the midst of May to the midst of August, half an hour at the most, and at every breakfast one half hour,) and all the said artificers and labourers, between the midst of September and the midst of March, shall be, and continue at their work from the spring of the day in the morning until the night of the same day, except it be in time afore appointed for breakfast and din-

ner, upon pain to lose and forfeit one penny for every hour's absence, to be deducted and defaulked out of his wages that shall so offend.

13. And be it also enacted by the authority aforesaid, that every artificer and labourer that shall be lawfully retained in and for the building or repairing of any church, house, ship, mill, or every other piece of work taken in great, in task, or in gross, or that shall hereafter take upon him to make or finish any such thing or work, shall continue and not depart from the same unless it be for not paying of his wages or hire agreed on, or otherwise lawfully taken or appointed to serve the queen's majesty, her heirs or successors, or for other lawful cause, or without license of the master or owner of the work, or of him that hath the charge thereof, before the finishing of the said work, upon pain of imprisonment by one month without bail or mainprise, and the forfeiture of the sum of five pounds to the party from whom he shall so depart, for the which the said party may have his action of debt against him that shall so depart in any of the queen's majesty's Courts of Record over and besides such ordinary costs and damages as may or ought to be recovered by the common laws for or concerning any such offence, in which action no protection, wager of law, or essoin shall be admitted.

14. And that no other artificer or labourer retained in any service to work with the queen's majesty, or any other person, depart from her said majesty, or from the said other person until such time as the work be finished, if the person so retaining the artificer or labourer so long will have him, and pay him his wages or other duties, upon pain of imprisonment of every person so departing by the space of one month.

[Sects. 15, 16, 17, 18 and 19 repealed 53 Geo. 3, c. 40.]

[*360] 20. And that every retainer, promise, gift, or payment of *wages or other thing whatsoever contrary to the true meaning of this estatute, and every writing and bond to be made for that purpose shall be utterly void and of none effect.

[Sect. 21 repealed 9 Geo. 4, c. 31, ante, p. 256.]

22. Provided always, and be it enacted by the authority aforesaid, that in the time of hay or corn harvest the justices of peace, and every of them, and also the constable or other head officer of every township, upon request, and for the avoiding of the loss of any corn, grain, or hay, shall and may cause all such artificers and persons as be meet to labour, by the directions of the said justices or constables or other head officers, or by any of them, to serve by the day for the mowing, reaping, shearing, setting, or inning of corn, grain and hay, according to the skill and quality of the person, and that none of the said persons shall refuse so to do upon pain to suffer imprisonment in the stocks by the space of two days and one night, and the constable of the town, or other head officer of the same where the said refusal shall be made, upon complaint to him made, shall have authority, by virtue hereof, to set the said offender in the stocks for the time aforesaid, and shall punish him accordingly, upon pain to lose and forfeit for not doing thereof the sum of forty shillings.

23. Provided also, that all persons of the counties where they have accustomed to go into other shires for harvest-work, and having at that time no harvest-work sufficient in the same town or county where he or

they dwelt in the winter then last past, bringing with him or them a testimonial(*f*) under the hand and seal of one justice of the peace of the shire, or other head officer of the town or place that he or they come from testifying the same, for the which he shall pay not above one penny, (other than such persons as shall be retained in service, according to the form of this estatute,) may repair and resort in harvest of hay or corn from the counties wherein their dwelling places are into any other place or county for the only mowing, reaping and getting of hay, corn or grain, and for the only working of harvest-works as they might have done before the making of this estatute, anything herein contained to the contrary notwithstanding.

24. And be it further enacted by the authority aforesaid, that two justices of peace, the mayor or other head officer of any city, borough or town corporate, and two aldermen, or two other discreet burgesses of the same city, borough or town corporate, if *there be no aldermen, shall and may by virtue hereof appoint any such woman as is of [*361] the age of twelve years and under the age of forty years, and unmarried, and forth of service as they shall think meet to serve, to be retained or serve by the year, or by the week or day for such wages and in such reasonable sort and manner as they shall think meet, and if any such woman shall refuse so to serve, then it shall be lawful for the said justices of peace, mayor or head officers, to commit such woman to ward until she shall be bounden to serve as is aforesaid.

[Sects. 25 to 30, inclusive, repealed 54 Geo. 3, c. 96.
Sects. 27 and 29, were previously partly repealed 49 Geo. 3, c. 109.
Sect. 31, repealed 54 Geo. 3, c. 96.
having been partly repealed as to distillers, 12 Ann. stat. 2, c. 3.
as to certain officers in the army and navy, 22 Geo. 2, c. 44.
as to hatters, 17 Geo. 3, c. 55, s. 5.
as to clothiers, &c., 49 Geo. 3, c. 109.
See Rex v. Kilderby, 1 Wms. Saund. 309, and notes.
Sect. 32, repealed 5 & 6 Wm. & M. c. 9.]

33. And be it further enacted by the authority aforesaid, that all and every person and persons that shall have three apprentices in any of the said crafts, mysteries or occupations of a *clothmaker*, *fuller*, *sheerman*, *weaver*,(*g*) tailor or shoemaker shall retain and keep one journeyman, and for every other apprentice above the number of the said three apprentices one other journeyman, upon pain for every default therein ten pounds.

34. Provided, always that this act nor anything therein contained, shall not extend to prejudice, or hinder any liberties heretofore granted by any act of Parliament to or for the company and occupation of worsted makers and worsted weavers within the city of Norwich, and elsewhere

(*f*) See as to *certificates* to prevent settlement (which have, however, grown into disuse since 35 Geo. 3, c. 101, which rendered poor persons irremovable till actually chargeable,) 13 & 14 Car. 2, c. 12; 8 & 9 Wm. 3, c. 30; 9 & 10 Wm. 3, c. 11; 12 Ann. stat. 1, c. 18; 3 Geo. 2, c. 29; 51 Geo. 3, c. 80; 54 Geo. 3, c. 107; 1 & 2 Geo. 4, c. 32.

(*g*) Repealed as to trades in *italics*, 49 Geo. 3, c. 109.

within the county of Norfolk, which liberties be in force until the beginning of this present Parliament, anything herein contained to the contrary in any wise notwithstanding.

35. And be it further enacted, that if any person shall be required by any householder having and using half a ploughland at the least in tillage to be an apprentice and to serve in husbandry, or in any other kind of art, mystery or science before expressed, and shall refuse so to do, that then upon the complaint of such housekeeper made to one justice of the peace of the county wherein the said refusal is or shall be made, or of such householder inhabiting in any city, town corporate or market town, to the mayor, bailiffs or head officer of said city, town corporate or market town, if any such refusal shall there be, they shall have full power [*362] and authority by virtue hereof to send for the *same person so refusing, and if the said justice, or the said mayor or head officer shall think the said person meet and convenient to serve as an apprentice in that art, labour, science, or mystery wherein he shall be so then required to serve, that then the said justice, or the said mayor or head officer shall have power and authority by virtue hereof, if the said person refuse to be bound as an apprentice, to commit him unto ward, there to remain until he be contented and will be bounden to serve as an apprentice should serve according to the true intent and meaning of this present act. And if any such master shall misuse or evil intreat his apprentice, or that the said apprentice shall have any just cause to complain, or the apprentice do not his duty to his master, then the said master or apprentice, being grieved and having cause to complain, shall repair unto one justice of peace within the said county, or to the mayor or other head officer of the city, town corporate, market town or other place where the said master dwelleth, who shall by his wisdom and discretion take such order and direction between the said master and his apprentice as the equity of the cause shall require; and if for want of good conformity in the said master, the said justice of peace, or the said mayor or other head officer cannot compound and agree the matter between him and his apprentice, then the said justice, or the said mayor or other head officer, shall take bond of the said master to appear at the next sessions then to be holden in the said county, or within the said city, town corporate or market town to be before the justices of the said county, or the mayor or head officer of the said town corporate or market town if the said master dwell within any such; and upon his appearance and hearing of the matter before the said justices, or the said mayor or other head officer, if it be thought meet unto them to discharge the said apprentice of his apprenticehood, that then the said justices, or four of them at the least, whereof one to be of the quorum, or the said mayor or other head officer, with the assent of three other of his brethren or men of best reputation within the said city, town corporate or market town, shall have power by authority hereof in writing under their hands and seals to pronounce and declare that they have discharged the said apprentice of his apprenticehood and the cause thereof, and the said writing so being made and enrolled by the clerk of the peace or town clerk amongst the records that he keepeth shall be a sufficient discharge for the said apprentice

against his master, his executors and administrators, the indenture of the said apprenticehood or any law or custom to the contrary notwithstanding;(*h*) and if the default shall be found to be in the *apprentice, then the said justices, or the said mayor or other head officer [*363] with the assistance aforesaid, shall cause such due correction and punishment to be ministered unto him as by their wisdom and discretions shall be thought meet.

36. Provided, always, and be it enacted by authority of this present Parliament, that no person shall by force or colour of this estatute be bounden to enter into an apprenticeship other than such as be under the age of twenty-one years.

37. And to the end that this estatute may from time to time be carefully and diligently put in good execution according to the tenor and true meaning thereof, be it enacted, by authority of this present Parliament, that the justices of the peace of every county, dividing themselves into several limits, and likewise every mayor and head officer of any city or town corporate, shall yearly, between the feast of St. Michael the Archangel and the Nativity of our Lord, and between the Feast of the Annunciation of our Lady and the Feast of the Nativity of St. John Baptist, by all such ways and means as to their wisdoms shall be thought most meet, make a special and diligent inquiry of the branches or articles of this estatute and of the good execution of the same, and where they shall find any defaults to see the same severely corrected and punished without favour, affection, malice, or displeasure.

38. And in consideration of the pains and travel that the said justices of peace and the said mayor or head officer shall take and sustain in and about the execution of this estatute, it is further ordained and enacted by authority of this present Parliament, that every justice of peace, mayor, or head officer, for every day that he shall sit in and about the execution of this estatute, shall have allowed unto him five shillings, to be allowed and paid unto him, or unto the said mayor or head officer, of the fines and forfeitures of the pains and penalties that shall be forfeited and due unto the Queen's Majesty, her heirs and successors, by force of this estatute, in such manner and form as the said justices have been heretofore commonly paid for their coming and charges at the quarter sessions, so that the sitting of the said justices, or mayor, or head officer be not at any one time above three days, and for matters contained in this estatute.

39. And be it enacted, by authority aforesaid, that the one half of all forfeitures and penalties expressed and mentioned in this estatute, other than such as are expressly otherwise appointed, shall be to our sovereign Lady the Queen's Majesty, her heirs and successors, and the other moiety to him or them that shall sue for the same in any of the Queen's Majesty's Courts of record, or before any of the justices of oyer and terminer, or before any other justices or president and council, *before remembered by action of debt, information, bill of complaint, or other- [*364]

(*h*) The justices have no power under this section to direct the return of any part of the premium paid to the master, or the non-payment of any part of it remaining unpaid; East v. Pell, 4 M. & W. 665. Semble, per Alderson, B., that it does not apply to cases where a premium is given, but only to compulsory bindings without premium.

wise,(*i*) in which actions or suits no protections, wager of law, or essoin shall be allowed; and this the said justices, or two of them, whereof one to be of the quorum, and the said presidents and council as is aforesaid, and the said mayors or other head officers of cities or towns corporate, shall have full power and authority to hear and determine all and every offence and offences that shall be committed or done against this estatute, or against any branch thereof, as well upon indictment to be taken before them in the sessions of the peace, as upon information, action of debt, or bill of complaint, to be sued or exhibited by any person, and shall and may by virtue hereof make process against the defendant and award execution as in any other case they lawfully may by any the laws and statutes of this realm, and shall yearly, in Michaelmas Term, certify by estreat the fines and forfeitures of every the offences contained in this estatute that shall be found before them into the Court of Exchequer, in like sort and form as they be bound to certify the estreats for other offences and forfeitures to be lost before them, anything in this statute contained to the contrary notwithstanding.(*k*)

40. Provided always, that this act, or anything therein contained or mentioned, shall not be prejudicial or hurtful to the cities of London(*l*) and Norwich, or to the lawful liberties, usages, customs, or privileges of the same cities for or concerning the having or taking of any apprentice or apprentices, but that the citizens and freemen of the same cities shall and may take, have, and retain apprentices there in such manner and form as they might lawfully have done before the making of this statute, this act or any thing therein contained to the contrary in any wise notwithstanding.

[Sect. 41 repealed, 54 Geo. 3, c. 96.]

42. And because there hath been and is some question and scruple moved whether any person, being within the age of one-and-twenty years, and bounden to serve as an apprentice in any other place than in the said city of London, should be bounden, accepted, and taken as an apprentice;

43. For the resolution of the said scruple and doubt, be it enacted, by authority of this present parliament, that all and every such person or persons that at any time or times from henceforth shall be bounden by indenture to serve as an apprentice in any art, science, occupation, or labour, according to the tenor of this estatute and in manner and form aforesaid, [*365] albeit *the same apprentice or any of them shall be within the age of one and-twenty years at the time of the making of their several indentures, shall be bounden to serve for the years in their several indentures contained as amply and largely to every intent(*m*) as if the same apprentice were of full age at the time of the making of such indentures, any law, usage, or custom to the contrary notwithstanding.

44. Provided always, and be it enacted, by the authority aforesaid, that the inhabitants now dwelling or inhabiting, or that hereafter shall

(*i*) As to actions for penalties under this section, see 31 Eliz. c. 5; 21 Jac. 1, c. 4; 1 Wms. Saund. 312 a, note; Fife v. Bousfield, 6 Q. B. 100.

(*k*) And see 54 Geo. 3, c. 96, s. 3. (*l*) And see 54 Geo. 3, c. 96, s. 4.

(*m*) But an infant apprentice is not hereby rendered liable to an *action* for breacho f the covenants in his indentures; Gylbert v. Fletcher, Cro. Car. 179.

dwell or inhabit within the town of Godalming, within the county of Surrey, within the limits of the watch of the said town, may use and exercise such arts, mysteries, and occupations, and take and use apprentices and servants in such manner and form as the inhabitants within market towns by this statute may lawfully do.

45. Provided always, and be it enacted, by the authority aforesaid, that all manner amerciaments, fines, issues, and forfeitures which shall arise, grow, or come by reason of any offences or defaults mentioned in this act or any branch thereof within any city or town corporate, shall be levied, gathered, and received by such person or persons, of the same city or town corporate, as shall be appointed by the mayor or other head officers mentioned in this said act to the use and maintenance of the same city or town corporate, in such case and condition as any manner other amerciaments, fines, issues, or forfeitures have been used to be levied and employed within the same city or town corporate by reason of any grant or charter from the Queen's Majesty that now is, or of any her Grace's noble progenitors, made and granted to the same city, borough, or town corporate, any thing or clause before mentioned and expressed in this act to the contrary notwithstanding.

[Sect. 46 is merely a proviso that this act shall not extend to any lawful retainings or covenants had or made before the passing of this act.]

47. And be it further enacted, by the authority aforesaid, that if any servant or apprentice of husbandry, or of any art, science, or occupation aforesaid, unlawfully depart or flee into any other shire, that it shall be lawful to the said justices of peace, and to the said mayors, bailiffs, and other head officers of cities and towns corporate for the time being justices of the peace there, to make and grant writs of capias so many and such as shall be needful, to be directed to the sheriffs of the counties or to other head officers of the places whither such servants or apprentices shall so depart or flee, to take their bodies returnable before them at what time shall please them, so that if they *come by such process that they be put in prison till they shall find sufficient surety well and [*366] honestly to serve their masters, mistresses, or dames, from whom they so departed or fled, according to the order of the law.

48. Provided always, that it shall be lawful to the high constables of hundreds in every shire to hold, keep, and continue petty sessions, otherwise called statute sessions, within the limits of their authorities, in all shires wherein such sessions have been used to be kept, in such manner and form as heretofore hath been used and accustomed, so as nothing be by them done therein contrary or repugnant to this present act.

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22 Geo. 2, c. 27.

An Act for the more effectual preventing of Frauds and Abuses committed by Persons employed in the Manufacture of Hats, and in the Woollen, Linnen, *Fustian,* Cotton, *Iron, Leather, Fur, Hemp,* Flax,

Mohair, and Silk(*a*) *Manufactures; and for preventing unlawful Combinations of Journeymen Diers, and Journeymen Hotpressers, and of all Persons employed in the said several Manufactures; and for the better payment of their Wages.*

Whereas by an act made in the thirteenth year of his present Majesty's reign, intituled "An Act to explain and amend an Act made in the First Year of the reign of her late Majesty Queen Anne, intituled 'An Act for the more effectual preventing the Abuses and Frauds of Persons employed in the working up the Woollen, Linnen, Fustian, Cotton, and Iron Manufactures of this Kingdom, and for extending the said Act to the Manufactures of Leather,'" it is amongst other things enacted, that if any person or persons hired or employed in the working up of any woollen, linnen, fustian, cotton, or iron manufactures, shall purloin, imbezil, secrete, sell, pawn, exchange, or otherwise illegally dispose of any the materials with which he, she, or they shall be respectively entrusted to work up such woollen, linnen, fustian, cotton, or iron manufactures, whether the same be or be not first made up or manufactured, or shall reel false or short yarn, the person or persons so offending, and being thereof convicted in manner prescribed by the said act of the first year of her said late Majesty's reign, shall forfeit double the value of the [*367] damage which the owner or owners of such materials shall *respectively sustain thereby, together with full costs of prosecution for every such offence; and in case immediate payment of the respective forfeitures, together with such costs of prosecution as aforesaid, shall be neglected or refused to be made, that then it shall and may be lawful to and for the same justice of the peace, before whom such conviction shall be made, to cause the offender or offenders to be committed to the house of correction, to be there whipped and kept to hard labour for any time not exceeding fourteen days; and in case of a further conviction for a second or other subsequent offence, for imbezilling or purloining any of the materials in the said act of the first year of her said late Majesty's reign mentioned, that the person or persons so offending shall, for every second or other subsequent offence, forfeit four times the value of the damages which the owner or owners of such materials (whether the same be or be not made up or manufactured) shall sustain thereby, together with such costs of prosecution as shall be adjudged reasonable by the justice before whom such offender or offenders shall be respectively convicted; and in case immediate payment of the respective forfeitures, together with such costs of prosecution as aforesaid, shall be neglected or refused to be made, that then such justice, or any other justice of the peace for the county, riding, division, city, town, or place where such offences shall be committed, shall cause the said offenders to be committed to the house of correction, to be there kept to hard labour for any time not exceeding three months, nor less than one month, as to such justice shall seem reasonable; and also during the time of such commit-

(*n*) Repealed as to woollen, linen, cotton, flax, mohair, and silk manufactures, 6 & 7 Vict. c. 40, post.

ment shall cause the said offender or offenders to be publickly whipped in the market town where such offender or offenders shall be respectively committed, at the market place or cross of such town, once or oftener, as to such justice shall seem reasonable: and it is by the said act of the thirteenth year of his present Majesty's reign also further enacted, that every person or persons who shall buy or receive, accept or take, by way of gift, pawn, pledge, or sale, of or from any of the persons in the said act of the first year of her said late Majesty's reign mentioned, any woollen, linnen, fustian, cotton, or iron manufactures, either before or after the same shall be manufactured or converted into merchantable wares, knowing the same to be so purloined or imbezilled, and being thereof lawfully convicted, shall severally suffer the like forfeitures and penalties as are by the said acts respectively inflicted on persons purloining or embezilling such of the materials or manufactures enumerated in the said acts respectively; all which forfeitures, when recovered, are by the said act of the thirteenth year of his present Majesty's reign directed to be applied in manner following; that is to say, one moiety thereof to the use of the party or parties injured, and the other moiety to the use of the poor of the parish only where the offence shall be committed, with the like liberty and benefit of appealing to all *parties as is given [*368] in and by the said act of the first year of her said late Majesty; and it is by the said act of the thirteenth year of his present Majesty's reign also further enacted, that if any person or persons hired or employed in cutting, paring, washing, dressing, sewing, making up, or otherwise manufacturing of gloves, breeches, leather, skins, boots, shoes, slippers, wares, or other goods or merchandizes, to be made use of in any of the trades or employments, or in manner last mentioned, or in any branch or particular thereof, shall fraudulently purloin, imbezil, secrete, sell, pawn, or exchange all or any part of the gloves, breeches, leather, skins, parings, or shreds of gloves, or leather, or other materials with which he, she, or they, shall be entrusted to work up or manufacture, or shall purloin, imbezil, secrete, sell, pawn, or exchange any gloves, breeches, boots, shoes, slippers, or wares when made, wrought up, or manufactured, or do or wilfully permit any other act to lessen the value of such, or any part of such gloves, breeches, leather, skins, parings or shreds of gloves or leather, boots, shoes, slippers, or other wares last particularized, either before or after the same shall be respectively so made into wares, and be thereof lawfully convicted, in manner prescribed by the said last mentioned act, before one or more justice or justices of the peace for the county, riding, division, city, town, or place where such offence shall be committed, or where the party or parties so charged shall reside or inhabit, such justice or justices shall and may award the person or persons so offending to make a reasonable and suitable recompence and satisfaction for every offence to the parties respectively injured, for the damage by them sustained, so as the same do not exceed double the value of the gloves, breeches, leather, boots, shoes, slippers, wares, goods, or materials by such offender or offenders so purloined or imbezilled, secreted, sold, pawned, or exchanged: one-half thereof to go to the party or parties aggrieved, and the other half to the use of the poor of the parish or place where

such offence shall be committed, together with the full charges attending such conviction, to be levied by warrant under the hand and seal or hands and seals of such justice or justices, by distress and sale of the offender's goods; but if such offender or offenders shall not have goods sufficient to answer the forfeitures and the expences attending the premises, and shall also neglect or refuse immediately to pay the same, that then the said offender or offenders shall, by like warrant of such justice or justices last described, be for every distinct offence committed to the house of correction, or other public prison of such county, riding, city, town, or place, and there kept to hard labour for the space of fourteen days, and shall be there likewise whipped in such manner as the said justice or justices shall order and direct; and in case also of a subsequent conviction for a second or any other such like offence, that the person or persons so offending, for every second or other subsequent offence, shall [*369] forfeit four times the value of the *damages which the owner or owners of such materials, either before or after the same shall be respectively made up into wares, shall sustain thereby, together with such costs of prosecution as shall be adjudged reasonable by the justice before whom such offender or offenders shall be respectively convicted; and in case immediate payment of the respective forfeitures, together with such costs of prosecution as aforesaid, shall be neglected or refused to be made, that then it shall and may be lawful to and for such justice to commit the offender or offenders last described to the house of correction or other publick prison, to be there kept to hard labour for any time not exceeding three months, nor less than one month, as to such justice shall seem reasonable; and also during the time of such commitment shall cause the said offender or offenders to be publickly whipped in the market town where such offender or offenders shall be respectively committed, at the market place or cross of such town, once or oftener, as to such justice shall seem reasonable: and it is by the said act of the thirteenth year of his present Majesty's reign also further enacted, that every person and persons who shall knowingly or willingly buy or receive, accept or take, by way of pawn, pledge, sale, or in any other manner, of or from any of the persons offending in either of the particulars last mentioned, or of or from any other person or persons whatsoever (except of or from the person or persons in whom the property of such gloves, breeches, leather, boots, shoes, slippers, wares, goods, or other materials shall be at the time of such sale, pawn, or exchange), or offer so to do, such person or persons offending therein respectively shall for every offence, being convicted thereof in manner before prescribed by the said last mentioned act, make such suitable and reasonable recompence and satisfaction, within two days next after the matter or fact shall be determined by any one or more justice or justices as aforesaid, upon hearing the same, or else be subject to such distress, and, for want of sufficient distress, to be liable to the like punishment, as is by the said act directed to be inflicted on such person or persons as shall purloin, imbezil, secrete, sell, pawn, or exchange any gloves, breeches, leather, boots, shoes, slippers, wares, goods, or other materials or effects of that sort as aforesaid, and so in like manner for any second and every other subse-

quent offence: and whereas the penalties and forfeitures to which offenders against the said acts are subjected have not been sufficient to deter persons from committing the offences thereby intended to be prevented: and whereas many persons employed in the making of felts or hats, and in preparing or working up the manufactures of furr, hemp, flax, mohair, and silk, and also the manufactures made up of wool, furr, hemp, flax, mohair, cotton, or silk, or some of them mixed one with another, have of late been guilty of divers frauds and abuses, by purloining, imbezilling, secreting, selling, pawning, exchanging, or otherwise unlawfully disposing of the materials with which they have been *intrusted; and it is therefore become necessary to make provisions for preventing [*370] such offences for the future: therefore, for amending and rendering more effectual the said act made in the thirteenth year of his present Majesty's reign, and for extending the provisions and regulations therein and herein made, to the several manufactures hereinbefore mentioned, be it enacted by the King's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, that if any person or persons whatsoever, who shall be hired or employed to make any felt or hat, or to prepare or work up any woollen, linnen, fustian, cotton, iron, leather, furr, hemp, flax, mohair, or silk manufactures, or any manufactures made up of wooll, furr, hemp, flax, cotton, mohair, or silk, or of any of the said materials mixed one with another, shall from and after the twenty-fourth day of June one thousand seven hundred and forty-nine, purloin, imbezil, secrete, sell, pawn, exchange, or otherwise unlawfully dispose of any of the materials with which he, she, or they shall be respectively entrusted, whether the same or any part thereof be or be not first wrought, made up, manufactured, or converted into merchantable wares,(*o*) or shall reel false or short yarn,(*p*) and shall be thereof lawfully convicted(*q*) by the oath or (if the owner thereof be of the people called Quakers) solemn affirmation of the owner of such goods or materials, or by the oath or affirmation of any other credible witness or witnesses, or by the confession of the person or persons charged with such offence, before any one or more justice or justices of the peace of the county, riding, division, city, liberty, town, or place where such offence shall be committed, or where the person or persons so charged shall reside or inhabit (which oath or affirmation the said justice or justices is and are hereby impowered and required to administer), it shall and may be lawful to and for the said justice or justices, by warrant under his or their hand and seal or hands and seals, to commit the person or persons so convicted to

(*o*) See 17 Geo. 3, c. 56, post, and sect. 16, as to tools, &c.

(*p*) This punishment *for reeling false or short yarn* having been found too severe was repealed 14 Geo. 3, c. 44, and a punishment by penalty for the first offence not exceeding twenty shillings nor less than five shillings; for the second offence, not exceeding five pounds nor less than forty shillings, and for the third and subsequent offences, imprisonment with hard labour for one calendar month, and to be once publicly whipped at the nearest market town on a market day, substituted.

(*q*) As to form of conviction, see 58 Geo. 3, c. 51, s. 5; but see also 11 & 12 Vict. c. 43.

[*371] the house of *correction, or other public prison of such county, riding, division, city, liberty, town, or place, there to be kept to hard labour for the space of fourteen days, and also to order the person or persons so convicted to be once publickly whipped at the market place, or some other public place of the city, town, or place where such offender or offenders shall be respectively committed; and in case of a further conviction in manner before prescribed by this act, for or upon a second or other subsequent offence of the same kind, it shall and may be lawful to and for the justice or justices, before whom such conviction shall be had, to commit the person or persons so again offending to the house of correction, or other public prison as aforesaid, there to be kept to hard labour for any time not exceeding three months, nor less than one month; and also to order the person or persons so again offending to be publickly whipped at the market place, or some other publick place of the city, town, or place where such offender or offenders shall be respectively committed, twice or oftener, as to such justice or justices shall appear reasonable;(q) anything in the said act of the first year of her late Majesty's reign, or in the said in part recited act of the thirteenth year of his present Majesty's reign, to the contrary in anywise notwithstanding.

2. And be it further enacted by the authority aforesaid, that if any person or persons shall buy, receive, accept, or take, by way of gift, pawn, pledge, sale, or exchange, or in any other manner whatsoever, of or from any person or persons hired or employed to make any felt or hat, or to prepare or work up the woollen, linnen, fustian, cotton, iron, leather, furr, hemp, flax, mohair, or silk, manufactures, or any manufactures made up of wooll, furr, hemp, flax, cotton, mohair or silk, or of any of the said materials mixed one with another, any thrums or ends of yarn, or any other materials of wooll, furr, hemp, flax, cotton, or iron, or any leather, mohair, or silk, whether the same or any part thereof be or be not first wrought, made up, or manufactured, knowing the person or persons of whom he, she, or they so buy, receive, accept, or take the said materials to be so hired or imployed as aforesaid, and not having first obtained the consent of the person or persons so hiring or imploying him, her, or them, who shall offer to sell, pawn, pledge, exchange, or otherwise dispose of the said materials, or shall buy, receive, accept, or take in any manner whatsoever, of or from any other person or persons whomsoever, any of the said materials, whether the same be or be not first wrought, made up, or manufactured, knowing the same to be so purloined or imbezzilled, then and in every such case the person or persons so buying, receiving, accepting, or taking any such materials, being thereof lawfully convicted [*372] in manner before prescribed by this act for the conviction of *persons purloining or imbezzilling the said materials, shall for the first offence forfeit the sum of twenty pounds :(q) and in case the said forfeiture shall not be immediately paid, the justice or justices before whom such conviction shall be had, shall commit the party or parties so convicted to the house of correction, or other public prison as aforesaid, thereto

(q) See 17 Geo. 3, c. 56, post; and sect. 17, as to tools, &c.

be kept to hard labour for the space of fourteen days, unless the said forfeiture shall be sooner paid; and if, within two days before the expiration of the said fourteen days, the said forfeiture shall not be paid, the justice or justices is and are hereby impowered and required to order the person or persons so convicted to be publickly whipped at the market place, or some other public place of the city, town, or place where such offender or offenders shall be respectively committed, once or oftener, as to such justice or justices shall appear reasonable; and in case of a further conviction for or upon a second or any other subsequent offence of the same kind, the person or persons so again offending, being thereof convicted in manner before prescribed by this act, shall for every second or other subsequent offence, forfeit the sum of forty pounds;(r) and in case the said forfeiture shall not be immediately paid, the justice or justices before whom such conviction shall be had shall commit the party or parties so convicted to the house of correction, or other public prison as aforesaid, there to be kept to hard labour for any time not exceeding three months, nor less than one month, unless the said forfeiture shall be sooner paid; and if, within seven days before the expiration of the time for which such offender or offenders shall be so committed, the said forfeiture shall not be paid, the said justice or justices is and are hereby impowered and required to order such offender or offenders to be publickly whipped at the market place, or some other publick place of the city, town, or place where he, she, or they shall be respectively committed, twice or oftener, as to such justice or justices shall appear reasonable; and the said respective forfeitures of twenty pounds and forty pounds, when recovered, after satisfaction shall have been made thereout to the party or parties injured, together with such costs of prosecution as shall be judged reasonable by the justice or justices before whom such conviction shall have been had, shall be equally distributed amongst the poor of the parish or place where the person or persons so convicted shall reside or inhabit; anything in the said two first-mentioned acts, or either of them, to the contrary in any wise notwithstanding.

3. Provided always, and it is hereby enacted, that if any person convicted as aforesaid of buying, receiving, or taking to pawn any of the materials herein-before mentioned, shall think *himself or herself aggrieved by the judgment of the justice or justices before whom [*373] he or she shall have been convicted, such person shall have liberty to appeal to the justices at the next general or quarter sessions of the peace which shall be held for the county, riding, division, city, liberty, town, or place where such judgment shall have been given; and that the said execution of the said judgment shall in such case be suspended, the person so convicted entering into a recognizance at the time of such conviction, with two such sufficient sureties, in double the sum which such person shall have been adjudged to forfeit, upon condition to prosecute such appeal with effect, and to be forthcoming to abide the judgment and determination of the justices in the said general or quarter sessions: which

(r) See 17 Geo. 3, c. 56, sects. 3 & 4, post, whereby the penalties are increased.

recognizance the said justice or justices before whom such conviction shall be had is and are hereby impowered and required to take: and the justices in the said general or quarter sessions are hereby authorized and required to hear and finally determine the matter of the said appeal, and to award such costs as to them shall appear just and reasonable to be paid by either party; and if, upon the hearing of the said appeal, the judgment of the justice or justices before whom the appellant shall have been convicted shall be affirmed, such appellant shall immediately pay the sum which he or she shall have been adjudged to forfeit, together with such costs as the justices in the said general or quarter sessions shall award to be paid by him or them for defraying the expenses sustained by the defendant or defendants in such appeal; or in default of making such payments, shall suffer the respective pains and penalties by this act inflicted upon persons who shall neglect to pay or shall not pay the respective forfeitures by this act imposed upon such as shall be convicted of buying, receiving, or taking to pawn any of the materials hereinbefore mentioned, which shall have been purloined or imbezzled.

4. And be it further enacted by the authority aforesaid, that if any person or persons shall be charged with and afterwards convicted(*s*) of purloining or imbezzling any of the aforesaid materials, or of buying or receiving the same in manner before described, it shall and may be lawful to and for the justice or justices of the peace before whom such conviction shall be had to issue a warrant under his or their hand and seal, or hands and seals, directed to any person or persons, impowering him or them, in the presence of a constable or headborough, and in the day-time to enter into and search the houses, out-houses, shops, cellars, vaults, and other [*374] places belonging to(*s*) the person or *persons so convicted as aforesaid; and if upon any such search or searches there shall be found any thrums or ends of yarn, or any other materials of wooll, furr, hemp, flax, cotton, iron, leather, mohair, or silk, it shall and may be lawful to and for the person or persons impowered to make such search or searches as aforesaid to bring such materials before the said justice or justices, to be by him or them detained, and kept in safe custody; and if within the space of twenty-four days next after such thrums or ends of yarn, or other materials, shall be so taken and detained, it shall be made appear to the satisfaction of the said justice or justices that the person or persons from whose houses, out-houses, shops, cellars, vaults, or other places as aforesaid, the said materials shall be so taken and detained, is or are the lawful owner or owners thereof, and came to the possession of the same in an honest and lawful manner, then all such thrums or ends of yarn, or other materials, so taken and kept as aforesaid, shall be restored to the person or persons out of whose custody or possession the same shall have been so taken; but in case it shall not be made appear within the time before limited to the satisfaction of the said justice or justices, that the person or persons convicted as aforesaid is or are the lawful owner or owners of the said materials so taken and detained as aforesaid, then and in every

(*s*) See 17 Geo. 3, c. 56, s. 10, post, as to search *before* conviction, and in premises *not belonging* to person convicted.

such case the said materials shall be deemed and adjudged to be purloined or imbezzled; and it shall and may be lawful to and for the said justice or justices to direct all such thrums or ends of yarn, or other materials, to be publickly sold, and the money arising by such sale (the charges of such sale being first deducted) to be equally distributed amongst the poor of the parish or place where the person or persons so convicted shall reside or inhabit.

5. Provided always, and it is hereby enacted, that the said justice or justices, shall, within three days after such materials shall be brought to him or them as aforesaid, give notice thereof in writing under his or their hand and seal, or hands and seals, to the person or persons convicted as aforesaid, appointing in such notice a time and place for his, her, or their attending in order to make out and prove his, her, or their property in such materials so taken and detained as aforesaid; which time so to be appointed shall be twenty-one days, and not less than eighteen days after such notice given; and if the person or persons so convicted shall be detained in any house of correction, or other prison as aforesaid, the said justice or justices shall also cause a copy of the said notice, attested under his or their hand and seal or hands and seals, to be delivered to the master or keeper of such house of correction or other prison; which master or keeper is hereby required to bring or cause to be brought before such justice or justices the person or persons named in such notice, at the time and place therein specified, if the person or persons named in such notice be then in the custody of such master or keeper; and if any such master or keeper shall *neglect or refuse so to do, such master or keeper [*375] shall for every such neglect or refusal, forfeit to the person or persons respectively named in such notice the full value of the materials so taken, detained, and sold; to be recovered by distress and sale of the goods and chattels of such master or keeper, by warrant under the hand and seal or hands and seals of the justice or justices signing such notice, in case the said forfeiture shall not be immediately paid.

6. Provided also, and it is hereby further enacted, that if any person shall think himself or herself aggrieved by the judgment or order of the said justice or justices relating to the sale or disposal of the said materials so found and detained as aforesaid, such person shall have liberty to appeal against the judgment or order of the said justice or justices to the justices of the peace in the general or quarter sessions of the peace which shall be held for the same county, riding, division, city, liberty, or town corporate, next after such judgment or order shall be given or made; and that in the meantime the sale and disposal of such materials shall be postponed; notice in writing under the hand of the person intending to appeal, signifying such his or her intention, being given to the justice or justices by whom such order shall have been made before the time appointed for the sale and disposal of such materials; and the justices of the peace in the said general or quarter sessions of the peace are hereby authorized and empowered to summon and examine witnesses upon oath (or being of the people called Quakers, upon their solemn affirmation,) and to hear and finally determine the matter of the said appeal; and in case the said appellant shall not prosecute such his or her appeal, or for any other cause

the judgment of the said justice or justices by whom such order shall have been made shall be affirmed, it shall and may be lawful to and for the justices in the said general or quarter sessions of the peace to award such costs as they in their discretion shall think reasonable, to be paid by the appellant for defraying the expenses sustained by the defendant or defendants in such appeal.

7. And be it further enacted by the authority aforesaid, that if any person or persons entrusted with any of the materials hereinbefore mentioned, in order to prepare, work up, or manufacture the same, shall not use all such materials in the preparing, working up, or manufacturing of the same, and shall neglect or delay for the space of twenty-one days(*t*) after such materials shall be prepared, worked up, or manufactured, to return (if required by the owner or owners of such materials so to do) so much of the said materials as shall not be used as aforesaid to the person or persons entrusting him, her, or them therewith, such neglect or delay shall be deemed and adjudged to be an embezzling or purloining of such materials; and the person or *persons so neglecting or delaying, [*376] being thereof convicted in manner before prescribed for the conviction of offenders against this act, shall suffer the like punishment(*t*) as persons convicted of embezzling or purloining any of the materials hereinbefore mentioned are by this act rendered subject and liable to.

8. And be it further enacted by the authority aforesaid, that it shall and may be lawful to and for any one justice of the peace of any county, riding, division, city, liberty, town, or place, and he is hereby required, upon complaint to him made upon oath or (if the person complaining be of the people called Quakers) solemn affirmation of any offence committed against this act within the same county, riding, division, city, liberty, town, or place, to issue his warrant for apprehending and bringing before him, or before any other justice or justices of the peace of the same county, riding, division, city, liberty, town, or place, the person or persons charged with such offence; and the justice or justices before whom such person or persons shall be brought is and are hereby authorized and required to hear and determine the matter of every such complaint, and to proceed to conviction and judgment thereupon.(*u*)

9. And for the better regulating of the journeymen and other persons employed as manufacturers or workers in the manufacture of felts or hats, and in the woollen, linnen, fustian, cotton, iron, mohair, furr, hemp, flax, or silk manufactures, or any manufactures made up of wooll, furr, hemp, flax, linnen, cotton, mohair, or silk, or any of the said materials mixed one with another, be it further enacted by the authority aforesaid, that if any person who, at any time after the said twenty-fourth day of June one thousand seven hundred and forty-nine, shall be hired, retained, or employed to prepare or work up any of the manufactures herein before mentioned for any one master, shall neglect or refuse the performance thereof, by procuring or permitting himself or herself to be subsequently retained or employed by any other master or person whatsoever, before he or she shall have completed the work which he or she was first and origin-

(*t*) See 17 Geo. 3, c. 56, s. 7, post.
(*u*) Sect. 8 is repealed by 17 Geo. 3, c. 56, s. 8, post.

ally so hired, retained, or employed to perform, and which was first delivered to him or her, then and in every such case the person so offending, being thereof lawfully convicted by the oath or (being of the people called Quakers) affirmation of one or more credible witness or witnesses, before one or more justice or justices of the peace of the county, riding, division, city, liberty, town, or place where the offence or offences shall be committed, and be sent to the house of correction, there to be kept to hard labour for any time not exceeding one month.

10. Provided always, and it is herely enacted and declared *that this act, or any thing therein contained, shall not extend, [*377] or be construed to extend to repeal any of the provisions mentioned and contained in an act made in the thirteenth and fourteenth year of the reign of King Charles the Second, intituled "An Act for regulating the Trade of Silk-throwing;" or in an act made in the twentieth year of the reign of King Charles the Second, intituled "An Act to regulate the Trade of Silk-throwing;" or in an act made in the eighth and ninth years of the reign of King William the Third, intituled "An Act for the further Encouragement of the Manufacture of Lustrings and Alamodes within this realm, and for the better preventing the Importation of the same; for the Punishment of Silk Winders, Doublers, and other Persons convicted of purloining, imbezzilling, pawning, selling, or detaining any silk delivered them to wind, double, or work up, or after the same is wrought up, and of the Buyers, Receivers, or Persons taking to pawn any Silk so imbezzilled or purloined;" but that the said provisions shall remain in full force, and the penalties and forfeitures to which offenders against the said acts are thereby respectively subjected may be levied, recovered, and inflicted, in the same manner as such penalties and forfeitures might have been levied, recovered, and inflicted before the making of this act; any thing herein contained to the contrary thereof in any wise notwithstanding.

11. Provided nevertheless, and it is hereby further enacted and declared, that no person shall, by virtue of the said acts hereinbefore last mentioned, or of this act, suffer or be liable to suffer the punishments thereby inflicted twice for one and the same fact or offence.

12. And whereas by an act made in the twelfth year of the reign of his late Majesty King George the First, intituled "An Act to prevent unlawful Combinations of Workmen employed in the Woollen Manufactures, and for the better Payment of their Wages," all contracts, covenants, or agreements, and all by-laws, ordinances, rules, or orders, made or entered into, or hereafter to be made or entered into, by or between any persons brought up in, or professing, using, or exercising the art and mystery of a wooll comber, or weaver, or journeyman wooll comber, or journeyman weaver, in any parish or place within this kingdom, for regulating the said trade or mystery, or for regulating or settling the prices of goods, or for advancing their wages, or for lessening their usual hours of work, are declared to be illegal, null, and void, to all intents and purposes: and it is by the said last mentioned act (amongst other things) enacted, that if any wooll comber, or weaver, or journeyman wooll comber, or journeyman weaver, or other person concerned in any of the woollen

manufactures of this kingdom, shall at any time keep up, continue, act in, make, enter into, sign, seal, or be knowingly concerned in any contract, covenant, or agreement, by-law, ordinance, rule, or order of any club, society, or combination by the said act declared to be illegal, or [*378] shall presume or *attempt to put any such illegal agreement, by-law, ordinance, rule, or order in execution, every person so offending, being thereof lawfully convicted in manner prescribed by the said act, shall at the discretion of the justices of the peace, before whom such conviction shall be had, be committed either to the house of correction, there to be kept to hard labour for any time not exceeding three months, or to the common gaol of the county, city, town, or place where such offence shall be committed, there to remain without bail or mainprize for any time not exceeding three months: And it is by the said last mentioned act also further enacted, that if any person retained or employed as a wooll comber or weaver, or servant in the art or mystery of a wooll comber or weaver, shall depart from his service before the end of the time for which he is hired or retained, or shall quit or return his work before the same shall be finished according to agreement, unless it be for some reasonable cause, to be allowed by two or more justices of the peace within their respective jurisdictions, every person so offending, being thereof convicted in manner prescribed by the said act, shall be committed to the house of correction, there to be kept to hard labour for any time not exceeding three months; and if any wooll comber, weaver, servant, or person hired, retained, or employed in the said art or mystery, shall wilfully damnify, spoil, or destroy (without the consent of the owner) any of the goods, wares, or work committed to his care or charge, or wherewith he shall be entrusted, such offender being thereof convicted shall forfeit and pay to the owner or owners of such goods or wares so damnified, spoiled, or destroyed, double the value thereof, to be levied by distress and sale of the offender's goods and chattels, by warrant or warrants under the hands and seals of any two or more justices of the peace within their respective jurisdictions; and for want of sufficient distress such justices shall commit the party or parties offending to the house of correction, there to be kept to hard labour for any time not exceeding three months, or until satisfaction be made to the party or parties aggrieved for the same: And it is by the said last mentioned act also further enacted, that every clothier, serge maker, or woollen or worsted stuff maker, or person concerned in making any woollen cloths, serges, or stuffs, or concerned in employing wool combers, weavers, or other labourers in the woollen manufactory, shall pay to all persons by them employed in the woollen manufacture the full wages, or other price agreed on, in good and lawful money of this kingdom, and shall not pay the said wages, or other price agreed on, or any part thereof, in goods, or by way of tuck, or in any other manner than in money, or make any deduction from such wages or price for or on account of any goods sold or delivered previous to such agreement, by any person or persons whatsoever; and for the more easy recovery of the said wages, or price agreed on, any two or more justices of the peace, within their respective jurisdictions, are

*authorized and required, upon complaint made for that purpose, to summon before them the party or parties offending, and for [*379] non-payment of such wages, or price agreed on, in money as aforesaid, or sufficient satisfaction given for the same, to the good liking of the party or parties aggrieved, to issue their warrant or warrants under their hands and seals, for levying such wages or price due as aforesaid by distress and sale of the offender's goods and chattels, rendering the overplus to the owner; and for want of sufficient distress, to commit the party or parties so offending to the common gaol of the county, city, town, or place where such offence shall be committed, there to remain without bail or mainprize for the space of six months, or until he, she, or they shall pay such wages or price agreed on, in money as aforesaid, or give full satisfaction for the payment of the same, to the good liking of the party grieved: And it is by the said last mentioned act also further enacted, that if any clothier, serge maker, woollen or worsted stuff maker, or person concerned in making any woollen cloths, serges, or stuffs, or any way concerned in employing wool combers, weavers, or other labourers in the woollen manufactory, shall pay any person or persons employed by them their wages, or other price agreed on, or any part thereof, either in goods, or by way of truck, or in any other manner than in money, every person so offending shall also forfeit and pay the sum of ten pounds, one moiety thereof to the informer, and the other moiety to the party or parties aggrieved, to be levied by distress and sale of the offender's goods as aforesaid, rendering the overplus (if any be) to the owner: And it is by the said last mentioned act also provided, that it shall be lawful for any person aggrieved by any order or orders to be made by any two or more justices of the peace as aforesaid, to appeal to the justices of the peace at the next general quarter sessions to be holden for the county, city, division, parish, or place where such order shall be made, giving reasonable notice of such appeal, the reasonableness of which notice shall be determined by the justices at the quarter sessions to which such appeal is made; and if it shall appear to them that reasonable time or notice was not given, then they shall adjourn the said appeal to the next quarter sessions, and then and there finally hear and determine the same; and the justices who in the general quarter sessions shall hear the matter shall have power to award reasonable costs to either party, as to them shall seem just: And it is by the said last mentioned act also further enacted, that if any person or persons shall assault or abuse any master wooll comber, master weaver, or other person concerned in any of the woollen manufactures, whereby any such master or other person shall receive any bodily hurt for not complying with, or not conforming or not submitting to any such illegal by-laws, ordinances, rules, or orders aforesaid; or if any person or persons shall write or cause to be written, or knowingly send or cause to be sent, any letter or other writing *or message, [*380] threatening any hurt or harm to any such master wooll comber or master weaver, or other person concerned in the woollen manufacture, or threatening to burn, pull down, or destroy any of their houses, or outhouses, or to cut down or destroy any of their trees, or to maim or kill any of their cattle, for not complying with any demands, claims, or pre-

tences of any of his or their workmen, or others employed by them in the said manufacture, or for not conforming or not submitting to any such illegal by-laws, ordinances, rules, or orders as aforesaid, every person so knowingly and willingly offending in the premises, being thereof lawfully convicted, upon any indictment to be found within twelve calendar months next after any such offence committed, shall be adjudged guilty of felony, and shall be transported for seven years to some or one of his Majesty's colonies or plantations in America, by such ways and means, and in such manner, and under such pains and penalties, as felons in other cases are by law to be transported: And whereas it is necessary that the said several provisions and regulations in the said last in part recited act should be extended to journeymen dyers, journeyman hot pressers, and all other persons employed in the woollen manufacture in this kingdom, and also to journeymen, servants, workmen, and labourers employed in the making of felts or hats, and in the manufacture of silk, mohair, furr, hemp, flax, linnen, cotton, fustian, iron, and leather, or any manufactures made up of wooll, furr, hemp, flax, cotton, mohair, or silk, or of any of the said materials mixed one with another; be it therefore enacted by the authority aforesaid, that the said several before recited clauses in the said act made in the twelfth year of his late Majesty's reign, and all the provisions, regulations, pains, penalties, and forfeitures therein contained, shall, from and after the said twenty-fourth day of June, one thousand seven hundred and forty nine, extend, and be construed, deemed, and adjudged to extend, to journeymen dyers, journeymen hot pressers, and all other persons whatsoever employed in or about any of the woollen manufactures of this kingdom, and also to journeymen, servants, workmen, and labourers, and all other persons whatsoever employed in the making of felts or hats, or in or about any of the manufactures of silk, mohair, furr, hemp, flax, linnen, cotton, fustian, iron, or leather, or in or about any manufactures made up of wooll, furr, hemp, flax, cotton, mohair, or silk, or of any of the said materials mixed one with another, in as full and ample manner as the said provisions, regulations, pains, penalties, and forfeitures are by the said last mentioned act declared to extend to the several and respective persons therein named; and the pains, penalties, and forfeitures which shall be incurred by reason of any offence committed against the said last mentioned act, by any person or persons employed or concerned in or about any of the said manufactures hereinbefore enumerated, shall be inflicted, levied, and recovered in the same [*331] manner as the pains, *penalties, and forfeitures contained in the said last in part recited act are directed to be inflicted, levied, and recovered upon and against the several and respective persons therein mentioned.(v)

(v) So much of this section as relates to combinations of workmen, &c., is repealed, 6 Geo. 4, c. 29 (ante, p. 331): so much as creates a felony is repealed by 9 Geo. 4, c. 31 (ante, p. 256): and so much as relates to the payment of wages in goods, by 1 & 2 Wm. 4, c. 36. See 1 & 2 Wm. 4, c. 37, post, as to wages.

17 Geo. 3, c. 56.

An Act for amending and rendering more effectual the several Laws now in being, for the more effectual preventing of Frauds and Abuses by Persons employed in the Manufacture of Hats, and in the Woollen, Linen, *Fustian,* Cotton, *Iron, Leather, Fur, Hemp,* Flax, Mohair, and Silk(*w*) *Manufactures; and also for making Provisions to prevent Frauds by Journeymen Dyers.*

Whereas by an act made in the twenty-second year of the reign of his late Majesty King George the Second (intituled "An Act for the more effectual preventing of Frauds and Abuses committed by Persons employed in the Manufacture of Hats, and in the Woollen, Linen, Fustian, Cotton, Iron, Leather, Fur, Hemp, Flax, Mohair, and Silk Manufactures; and for preventing unlawful Combinations of Journeymen Dyers and Journeymen Hotpressers, and of all persons employed in the said several manufactures, and for the better Payment of their Wages,") it was enacted, that if any person or persons whatsoever, who should be hired or employed to make any felt or hat, or to prepare or work up any woollen linen, fustian, cotton, iron, leather, fur, hemp, flax, mohair, or silk manufactures, or any manufactures made up of wool, fur, hemp, flax, cotton, mohair, or silk, or of any of the said materials mixed one with another, should, from and after the twenty-fourth day of June one thousand seven hundred and forty-nine, purloin, embezzle, secrete, sell, pawn, exchange, or otherwise unlawfully dispose of any of the materials with which he, she, or they should be respectively intrusted, whether the same or any part thereof be or be not first wrought, made up, *manufactured, [*382] or converted into merchantable wares, and should be thereof lawfully convicted, in manner therein mentioned, before any one or more justice or justices of the peace of the county, riding, division, city, liberty, town, or place where such offence should be committed, or where the person or persons so charged should reside or inhabit, it should and might be lawful to and for the said justice or justices, by warrant under his or their hand and seal or hand and seals, to commit the person or persons so convicted to the house of correction or other public prison of such county, riding, division, city, liberty, town, or place, there to be kept to hard labour for the space of fourteen days, and also to order the person or persons so convicted to be once publicly whipped at the market place or some other public place of the city, town, or place where such offender or offenders should be respectively committed; and in case of a further conviction, in manner before prescribed by the said act, for or upon a second or other subsequent offence of the same kind, it should and might be lawful to and for the justice or justices before whom such conviction should be had to commit the person or persons so again offending to the house of correction or other public prison as aforesaid, there to be kept to hard

(*w*) Repealed as to woollen, linen, cotton, flax, mohair, and silk *manufactures*, 6 & 7 Vict. c. 40, post; and see Reg. v. Button, 11 Q. B. 941.

labour for any time not exceeding three months, nor less than one month, and also to order the person or persons so again offending to be publicly whipped at the market place or some other public place of the city, town, or place where such offender or offenders should be respectively committed, twice or oftener, as to such justice or justices should appear reasonable; and whereas it is thought necessary to vary the punishment for the offences hereinbefore recited; be it therefore enacted by the King's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, that from and after the first day of July one thousand seven hundred and seventy-seven, so much of the said recited act as prescribes what the punishment shall be in any of the cases before mentioned, or before whom such conviction shall be had, whether for a first offence or a second or any subsequent offence, shall be repealed; and instead of inflicting the punishment so directed the justices of the peace before whom the conviction shall be, shall commit the person convicted to the house of correction or other public prison, there to be kept to hard labour, in the case of a first offence, for any time not less than fourteen days nor more than three months, and in the case of a second or any subsequent offence, for any time not less than three months nor more than six months, and may likewise, for the first, or for any subsequent offence, order the person convicted to be once publicly whipped, if such additional punishment shall by the said justice or justices be deemed proper.

2. Provided always, and be it further enacted by the authority aforesaid, that no person or persons who shall be charged *with any [*383] offence or offences against the said recited act of the twenty-second year of the reign of his late Majesty King George the Second, shall be liable to be convicted unless before two or more justices of the peace for the county, riding, division, city, liberty, town, or place where the offence shall be committed; anything contained in the said recited act to the contrary hereof notwithstanding.

3. And whereas by the said act of the twenty-second year of the reign of his late Majesty King George the Second it was also enacted, that if any person or persons should buy, receive, accept, or take, by way of gift, pawn, pledge, sale, or exchange, or in any other manner whatsoever, of or from any person or persons hired or employed to make any felt or hat, or to prepare or work up the woollen, linen, fustian, cotton, iron, leather, fur, hemp, flax, mohair, or silk manufactures, or any manufactures made up of wool, fur, hemp, flax, cotton, mohair or silk, or of any of the said materials mixed one with another, any thrums or ends of yarn, or any other materials of wool, fur, hemp, flax, cotton, or iron, or any leather, mohair or silk, whether the same or any part thereof be or be not first wrought, made up, or manufactured, knowing the person or persons, of whom, he, she, or they so buy, receive, accept, or take the said materials to be so hired or employed as aforesaid, and not having first obtained the consent of the person or persons so hiring or employing him, her or them, who should offer to sell, pawn, pledge, exchange, or otherwise dispose of the said materials, or should buy, receive, accept,

or take, in any manner whatsoever, of or from any other person or persons whomsoever, any of the said materials, whether the same be or be not first wrought, made up, or manufactured, knowing the same to be so purloined or embezzled, then and in every such case the person or persons so buying, receiving, accepting, or taking any said materials, being thereof lawfully convicted in manner before prescribed by the said act for the conviction of persons purloining or embezzling, the said materials, should for the first offence, forfeit the sum of twenty pounds, and in case the said forfeiture should not be immediately paid, the justice or justices before whom such conviction should be had should commit the party or parties so convicted to the house of correction or other public prison as aforesaid, there to be kept to hard labour for the space of fourteen days, unless the said forfeiture should be sooner paid; and if within two days before the expiration of the said fourteen days the said forfeiture should not be paid, the said justice or justices is and are thereby empowered and required to order the person or persons so convicted to be publicly whipped at the market place, or some other public place of the city, town, or place where such offender or offenders should be respectively committed, once or oftener, as to such justice or justices should appear reasonable; and in case of a further conviction for or upon a second or any other subsequent *offence of the same [*384] kind, the person or persons so again offending, being thereof convicted in manner before prescribed by the said act, should for every second or other subsequent offence forfeit the sum of forty pounds; and in case the said forfeiture should not be immediately paid, the justice or justices before whom such conviction should be had should commit the party or parties so convicted to the house of correction or other public prison as aforesaid, there to be kept to hard labour for any time not exceeding three months nor less than one month, unless the said forfeiture should be sooner paid; and if within seven days before the expiration of the time for which such offender or offenders should be so committed the said forfeiture should not be paid, the said justice or justices is and are thereby empowered and required to order such offender or offenders to be publicly whipped at the market place, or some other public place of the city, town or place, where he, she, or they should be respectively committed, twice or oftener, as to such justice or justices should appear reasonable; and the said respective forfeitures of twenty pounds and forty pounds, when recovered, after satisfaction should have been made thereout to the party or parties injured, together with such costs of prosecution as should be judged reasonable by the justice or justices before whom such conviction should have been had, should be equally distributed amongst the poor of the parish or place where the person or persons so convicted should reside or inhabit: And whereas it is thought necessary to increase the pecuniary penalties directed by the said recited act for the said offences last mentioned, and to vary the application of the said penalties for the same, and further to change the consequences of non-payment; be it therefore further enacted, that from and after the said first day of July one thousand seven hundred and seventy-seven, so much of the said recited act of the twenty-second of his late Majesty

King George the Second as enacts what the penalty or punishment shall be for such buying, receiving, accepting, or taking, by way of gift, pawn, pledge, sale, or exchange, or in any other manner, as is described by the said act in the terms aforesaid, and how such penalty shall be applied, and what punishment shall be inflicted in case of non-payment, shall be repealed; and instead thereof the penalty for the first offence shall be any sum not more than forty pounds nor less than twenty pounds, as the justices before whom the conviction shall be shall judge to be most proper; and every such pecuniary penalty shall be applied, under the direction of the justices before whom the conviction shall be in manner following; (that is to say,) in the first place, the expenses of the prosecution shall be thereout defrayed, and then such satisfaction shall be made thereout to the party or parties injured as the said justices shall think proper, and afterwards so much of the said penalty shall be paid to the informer or informers as such justices shall think fit, not exceeding in any case ten pounds, *and the remainder, if any, shall be [*385] paid and distributed to and amongst the poor of the parish, town, or place where the conviction shall be, or for the use of such public charity or charities as such justices shall appoint;(x) and if such pecuniary penalty as aforesaid shall not be paid upon conviction, the said justices shall commit the person convicted to the house of correction or other public prison, there to be kept to hard labour for any time not more than six months nor less than three months, as the said justices shall think fit to direct, unless such pecuniary penalty shall be sooner paid; or the said justices may send the person convicted to the house of correction or other public prison, there to remain for three days, exclusive of the day of commitment, with an order that within the said time the person so convicted shall be once publicly whipped at such market place, or other public place as aforesaid.

4. And be it further enacted by the authority aforesaid, that from and after the said first day of July one thousand seven hundred and seventy-seven, if any person or persons shall be brought before any justices of of the peace, and shall be charged upon oath or (being of the people called Quakers) upon solemn affirmation of having been guilty of buying, receiving, accepting, or taking, by way of gift, pawn, pledge, sale, or exchange, or in any other manner, as is described by the said recited act, in the terms aforesaid, and it shall appear to such justices that the person or persons so charged hath or have been already convicted of the like offence for which he, she, or they is or are then charged, that then such justices shall not proceed to convict such person or persons, but shall commit him, her, or them to the house of correction or some other public prison, there to remain until the next general or general quarter sessions of the peace to be held in and for the county, riding, division, city, liberty, town or place where the offence shall have been committed, or until such offender or offenders shall have entered into a recognizance to

(x) As to the distribution of the penalty, see now 58 Geo. 3, c. 51, which applies to this act although therein erroneously referred to as having been passed in the *thirteenth* year of Geo. 3. See 3 Reg. v. Wilcock, 7 Q. B. 317; In re Boothroyd, 15 M. & W. 1.

answer for such offence at the said next general or general quarter sessions; and the justices in such general or general quarter sessions, are hereby authorized and required to take cognizance thereof, and to hear and determine the same; and if such person shall be convicted upon the oath or (being of the people called Quakers) upon the affirmation of one or more credible witness or witnesses, the person so convicted shall forfeit and pay for such offence any sum not more than one hundred pounds nor less than fifty pounds, as the said justices shall judge to be most proper; and every such penalty shall be *applied and disposed of, under the direction of the said justices in their general or [*386] general quarter sessions, in such manner and proportions as the penalty hereinbefore imposed for the first offence of the like nature is by this act directed to be applied and disposed of; and if such penalty shall not be paid on conviction the said justices shall commit the person so convicted to the house of correction or other public prison, there to be kept to hard labour for any time not more than six months nor less than three months, as the said justices shall, in their discretion, think fit unless such penalty shall be sooner, paid, or the said justices, may send the person convicted to the house of correction or other public prison, there to remain for three days, exclusive of the day of commitment, with an order that within the said time such person shall be once publicly whipped at such market-place, or other public place as aforesaid.

5. And whereas many frauds are practised in respect to such materials as aforesaid, by persons who sell them knowing them to have been purloined or embezzled; be it therefore further enacted, that after the said first day of July, one thousand seven hundred and seventy-seven, if any person shall sell, pawn, pledge, exchange, or otherwise unlawfully dispose of, or offer to sell, pawn, pledge, exchange, or otherwise unlawfully dispose of, any such materials as aforesaid, whether wrought or unwrought, mixed or unmixed, knowing them to have been purloined or embezzled, every such person lawfully convicted shall be liable to the same punishment as he or she would be liable to by virtue of this act on being convicted of receiving purloined or embezzled materials knowing them to have been purloined or embezzled.

6. And whereas such materials as aforesaid which have been purloined or embezzled are frequently received by persons knowing the same to have been so purloined or embezzled, and such materials being afterwards worked up or otherwise disposed of renders it difficult to convict such offenders; be it therefore enacted by the authority aforesaid, that from and after the said first day of July one thousand seven hundred and seventy-seven, when any person or persons shall be brought or charged upon oath before any two or more justices of the peace, by virtue of this act, with being suspected of or with having purloined or embezzled or with having received any such materials as aforesaid, whether the same be wrought or unwrought, mixed or unmixed, knowing the same to have been either purloined or embezzled or received from some person or persons not entitled to dispose thereof, and it shall be made appear upon the oath or (being of the people called Quakers) upon the affirmation of one or more credible witness or witnesses, to the satisfaction of such justices,

that such person or persons hath or have purloined or embezzled or hath or have received any such materials as aforesaid, knowing the same to have been purloined or embezzled or received from some person or persons [*387] not entitled to *dispose thereof, it shall and may be lawful for such justices, or for the justices at their general or general quarter sessions of the peace, and they are hereby respectively authorized and empowered (if they shall think fit) to convict such person or persons of having purloined or embezzled or of having received such materials as aforesaid, knowing the same to have been purloined or embezzled or received from some person or persons not entitled to dispose thereof, although no proof shall be given to whom such materials belong; and the person or persons so convicted shall for every such offence be subject to such and the like penalties and punishments, at the discretion of such justices respectively, as persons convicted of buying or receiving any such materials as aforesaid, knowing the same to have been purloined or embezzled, are by this act subject and liable to.(*y*)

7. And whereas by the said recited act of the twenty-second of King George the Second it was also enacted, that if any person or persons intrusted with any of the materials therein and hereinbefore mentioned, in order to prepare, work up, or manufacture the same, should not use all such materials in the preparing, working up, or manufacturing the same, and should neglect or delay, for the space of twenty-one days after such materials should be prepared, worked up, or manufactured, to return (if required by the owner or owners of such materials so to do) so much of said materials as should not be used as aforesaid, to the person or persons intrusting him, her, or them therewith, such neglect or delay should be deemed a purloining or embezzling of such materials; and the person or persons so neglecting or delaying, being thereof convicted in manner thereinbefore prescribed for the conviction of offenders against the said act, should suffer the like punishment as persons convicted of purloining or embezzling any of the materials thereinbefore mentioned are by the said act rendered subject and liable to: And whereas the space of twenty-one days allowed by the said recited act is thought too long a time to be allowed for returning the said materials, under the circumstances, and in manner aforesaid, and it may be proper to make the punishment for not returning such materials the same as for purloining or embezzling, under this act; be it therefore further enacted, that from and after the said first day of July, one thousand seven hundred and seventy-seven, so much of the said recited act as allows twenty-one days after the preparing, working up, or manufacturing the said materials, for returning so much of the said materials as shall not be used in such preparing, working up, or man- [*388] ufacturing, and declares that the punishment for not *so returning the said materials within the said time shall be the same as under the said act is directed for purloining or embezzling, shall be repealed, and only eight days shall be allowed for returning the said

(*y*) A conviction under this act for embezzling materials, although confirmed on appeal cannot be removed by certiorari, that writ being taken away by sect. 22. See Reg. v. Cook, 1 Dowl. N. S. 300.

materials in manner aforesaid, and the punishment for not returning them within the said eight days shall be the same as is by this act directed to be inflicted for purloining or embezzling.

8. And whereas by the said act of the twenty-second year of the reign of his late Majesty King George the Second it is enacted, that, from and after the said twenty-fourth day of June, one thousand seven hundred and forty-nine, if any person who should be hired, retained, or employed to prepare or work up any of the manufactures thereinbefore mentioned, for one master, should neglect or refuse the performance thereof, by procuring or permitting himself or herself to be subsequently retained or employed by any other master or person whatsoever, before he or she should have completed the work which he or she was first and originally so hired, retained or employed to perform, and which was first delivered to him or her, then and in every such case the person so offending, being thereof lawfully convicted by the oath or (being of the people called Quakers) affirmation of one or more credible witness or witnesses, before one or more justice or justices of the peace of the county, riding, division, city, liberty, town, or place where the offence or offences should be committed, should be sent to the house of correction, there to be kept to hard labour for any time not exceeding one month: And whereas the said provision contained in the said recited clause is not found sufficient for the purpose intended, and it is apprehended that some other provision more proper may be made; be it therefore further enacted, that from and after the said first day of July, one thousand seven hundred and seventy-seven the whole of the said last recited clause shall be repealed; and that from and after the said first day of July, one thousand seven hundred and seventy-seven if any person, being hired, retained, or employed to prepare or work up any materials, whether mixed or unmixed, for any master or masters, shall wilfully neglect or refuse the performance thereof for eight days successively, or, having taken in any materials, whether mixed or unmixed, for manufacture, from one master, or two or more masters being copartners, shall afterwards take in any materials, whether mixed or unmixed, for manufacture, from any other master or masters, or shall procure or permit himself or herself to be employed or retained in any other occupation or employment whatsoever sooner than eight days before the completion of the work first taken, then and in every such case such person, being thereof lawfully convicted by the oath or (being of the people called Quakers) affirmation of one or more credible witness or witnesses, before two or more justices of the peace of the county, riding, division, city, liberty, town, or place where the *offence or offences shall be committed, shall be sent to the house of correction or other [*389] public prison, there to be kept to hard labour for any time not exceeding three months nor less than one month.

9. And whereas it frequently happens that persons receive the said materials in fictitious names, in order to be manufactured, and that persons receive such materials in their own names, in order to be manufactured by themselves, and afterwards deliver the same to others to be manufactured, without the knowledge or consent of the owners thereof, and that carriers, or other persons employed to deliver materials to workmen to be

prepared or manufactured, do designedly deliver such materials to other persons than those intended by the owners of such materials; be it therefore further enacted by the authority aforesaid, that from and after the said first day of July, one thousand seven hundred and seventy-seven, if any person shall receive any of the aforesaid materials in a fictitious name, in order to be manufactured, or if any person shall receive in his or her own name any of the said materials, in order to be manufactured by himself or herself, and afterwards deliver the same, or any part thereof, to any other person, to be manufactured, (without the consent of the owner thereof), or if any carrier, or other person employed to deliver any such materials to any workman, to be prepared or wrought up, shall designedly deliver the same to any other person than the person to whom such materials were ordered or intended to be delivered by the owner thereof, all and every person and persons offending in any of the cases aforesaid shall, for such offence be liable to prosecution, in the same manner and to the same punishment as is by this act directed in respect to persons taking in any of the said materials, in order to work up, and afterwards wilfully neglecting or refusing the performance of their work for the space of time aforesaid.

10. And whereas it frequently happens that materials used in the manufactures before mentioned are found or known to be concealed in the possession of persons who have received the same, knowing them to be purloined or embezzled, or of persons known not to be entitled to dispose of the same: And whereas the discovery and conviction of the purloiners and embezzlers, buyers and receivers of such materials, is full of difficulty, from the close and clandestine manner in which the offence is committed, and there is still greater difficulty in proving whose property such materials are; and it would tend to the discouragement and suppression of such offences if the discovery and conviction of such offenders were rendered more easy: And whereas by the said recited act of the twenty-second year of his late Majesty King George the Second, justices of the peace, after conviction of any offender for purloining or embezzling the said materials, or for buying or receiving the same, are authorized to grant war-
[*390] rants for searching the houses *and other places of the persons so convicted, but no such authority is given before conviction, nor in any other house or place except such as belongs to a person convicted; be it therefore further enacted, that it shall and may be lawful for any two(z) justices of the peace of any county, riding, division, city, liberty, town, or place, upon complaint made to them upon oath by any one credible person, or (being of the people called Quakers) upon solemn affirmation, that there is cause to suspect that any such purloined or embezzled materials, whether mixed or unmixed, wrought or unwrought, are concealed in any dwelling-house, outhouse, yard, garden, or other place or places, by virtue of a warrant under their hands and seals,(a) to cause every

(z) If the complaint is made to different justices from those who determine it, the conviction should state that, as required by 3 Geo. 4, c. 23, s. 2, a conviction which omitted such statement was quashed; Reg. v. Wilcock, 7 Q. B. 317.

(a) A search warrant under this sect. is necessary to justify *entering a house* to search for embezzled materials; Davis v. Nest, 6 C. & P. 167. But in trespass for

such dwelling-house, outhouse, yard, garden, or place to be searched in the daytime, and if any such materials suspected to be purloined or embezzled shall be found therein, to cause the same, and the person or persons in whose house, outhouse, yard, garden, or other place the same shall be found, to be brought before any two(*b*) justices of the peace for the same county, riding, division, city, liberty, town, or place, and if the said person or persons shall not give an account to the satisfaction of such justices how he, she, or they came by the same, then the said person or person so offending shall be deemed and adjudged guilty of a misdemeanor, and shall be punished in manner hereinafter mentioned, although no proof shall be given to whom such materials belong.(*c*)

11. And be it further enacted, that every peace officer, constable headborough, or tythingman in every county, city, town corporate, or other place where there shall be officers, and every beadle within his ward, parish, or district, and every watchman, during such time only as he is on his duty, shall and may apprehend or cause to be apprehended all and every *person or persons who may reasonably be suspected of having or carrying or any ways conveying, at any time after [*391] sunsetting and before sunrising, any of such materials suspected to be purloined or embezzled, and the same, together with such person or persons, as soon as conveniently may be, convey or carry before any two justices of the peace for the county, riding, division, city, liberty, town, or place within which the suspected person or persons shall be apprehended; and if the person or persons so apprehended in conveying any such materials shall not produce the parties, duly entitled to dispose thereof, from whom he, she, or they bought or received the same, or some other credible witness, to testify upon oath or (being of the people called Quakers) upon solemn affirmation to the sale or delivery of the said materials (which oath or affirmation respectively such justices are hereby empowered to administer) or shall not give an account, to the satisfaction of such justices, how he, she, or they came by the same, then the said person or persons so apprehended shall be deemed and adjudged guilty of a misdemeanor, and be punished in manner hereinafter mentioned, although no proof shall be given to whom such materials belong.

12. Provided always, and be it further enacted, that in either of the two cases last before mentioned, when any person or persons who shall be brought before any two justices of the peace shall request of such justices to appoint a reasonable time to produce the person or persons, duly entitled to sell or dispose of the same, or from whom he, she, or they bought or received the same, or some one or more credible witness or witnesses to prove the sale or delivery thereof, then and in such case it shall and may be lawful for the said justices, and they are hereby autho-

breaking and entering the house of A., and taking his woollen yarn, the defendant may, under not guilty, shew a condemnation of the yarn under this statute; as that shews that A. could have no property in it; ibid.

(*b*) See note (*z*) supra.

(*c*) In a conviction under this sect. it is not necessary to state the ownership of the goods; In re Boothroyd, 15 M. & W. 1; and see ibid. as to distribution of penalty. As to an indictment for perjury committed by exhibiting false information under this sect. see Reg. v Goodfellow, Carr. & M. 569.

rized and required to appoint such reasonable time as aforesaid, and to issue out a summons to the constable or other peace officer of the parish or place where such person or persons, or such witness or witnesses, shall respectively reside, requiring him, her, or them to appear before two or more justices at such time and place as shall be so appointed by such justices, in order to be examined and give evidence on oath or (being of the people called Quakers) solemn affirmation of the several matters aforesaid; but such person or persons, at the time of making such request, shall enter into a recognizance, with or without surety or sureties, as such justices shall think proper, for his, her, or their appearance before them at the time so to be set, or, for want of such recognizances as aforesaid, shall be committed until the time that shall be set or appointed by the said justices for the appearance of such party or parties, witness or witnesses; and if at such appointed time such person or persons shall be convicted [*392] of any of the offences aforesaid,(*d*) *then and in such case, he, she or they shall suffer such punishment as is hereinbefore directed to be inflicted on persons guilty of such offences.

13. And be it further enacted, that where any person or persons shall be convicted of a misdemeanor in either of the two cases last before mentioned it shall and may be lawful for the justices before whom the conviction shall be to cause the said materials so found or seized as aforesaid to be deposited in the hands of the churchwardens or overseers of the poor of the place where such materials shall be found or seized, or in any other convenient place, for any time not exceeding thirty days, and in the mean time to order the said churchwardens and overseers of the poor, or one of them, to insert an advertisement in some one or more of the public newspapers usually published or circulated in or near such place, or otherwise to cause notice to be given by some public crier, and by fixing on the church or chapel door notice describing such materials, and where the same are so deposited, to the end that persons having lost such materials, or any reputable person or persons in their behalf, may come and claim the same; and in case any person or persons can prove his, her, or their property in the said materials upon oath, or (being of the people called Quakers) upon his, her, or their solemn affirmation, to the satisfaction of any two justices of the peace for such county, riding, division, city, liberty, town, or place, then such justices shall order restitution of such materials to the owner or owners thereof, after paying the reasonable charges of removing, depositing, and giving public notice of the same; but if before the end of the said thirty days no person or persons shall come and prove his, her, or their property in such materials, nor any reputable person or persons on his, her, or their behalf, then the said justices shall order and direct the same to be sold for the best price that can reasonably be had, and after deducting such charges as aforesaid, together with the charges of sale, one moiety of the money arising from such sale

(*d*) A conviction which stated, that A. B. was convicted before the magistrates upon the oath of T. J., a credible witness, of having in his possession, in his dwelling-house, certain materials used in the woollen manufacture, suspected to be embezzled and purloined, to wit, &c., he not producing the party from whom he bought the same or giving a satisfactory account; and then going on to adjudicate, was held good in Davis v. Nest, 5 C. & P. 167.

shall be given to the person or persons, or either of them, who shall apprehend or prosecute the offender or offenders guilty of either of the misdemeanors aforesaid, as the said justices shall appoint, and the other moiety thereof, either to and amongst the poor of the parish, town, or place where the conviction shall be, or to such public charity or charities as the justices convicting shall appoint.

14. And be it further enacted that every person deemed *and adjudged guilty of a misdemeanor, in having in his or her possession any materials suspected to be purloined or embezzled, and not producing the party or parties, being duly entitled to dispose of the same, of whom he or she bought or received the same, nor giving a satisfactory account how he or she came by the same, or of a misdemeanor in having, carrying, or conveying of the said materials suspected to be purloined or embezzled, and not producing the party or parties, being duly entitled to dispose of the same, of whom he or she bought or received the same, nor any credible witness to testify upon oath or (being of the people called Quakers) upon solemn affirmation the sale or delivery thereof, nor giving a satisfactory account how he or she came by the same, (as the case shall be,) shall for every such misdemeanor forfeit, for the first offence, the sum of twenty pounds, and for the second offence the sum of thirty pounds, and for every subsequent offence the sum of forty pounds; all which said respective forfeitures shall and may be levied by distress and sale of the goods and chattels of every such offender, (rendering to him or her the overplus after charges of the said distress and sale deducted,) by warrant under the hands and seals of the justices before whom such offenders shall be deemed and adjudged guilty, of which forfeiture one moiety shall be paid to the informer, and the other moiety thereof to and amongst the poor of the parish, town, or place where such conviction shall be, or to such public charity or charities as the justices convicting shall appoint;(*e*) and if no sufficient distress shall be found whereon to levy the said respective forfeitures, then the said justices shall and may commit every such offender so respectively deemed and adjudged guilty as aforesaid to the common gaol or other prison or house of correction within his or their jurisdiction, without bail or mainprize, for the space of one month for the first offence, and for the second offence for the space of two months, and for every subsequent offence for the space of six months. [*393]

15. And whereas it sometimes happens, by occasion of the very long detention of such materials as aforesaid, delivered out to journeymen or other persons employed to work up the same, it cannot be known to the master or owners of such materials whether the same may have been purloined or embezzled, or whether the said materials are wholly or in part wrought or begun to be wrought, or in what state or condition such materials may be; for remedy whereof be it further enacted, that from and after the said first day of July one thousand seven hundred and seventy-seven it shall be lawful for the owner or owners of any such materials, from time to time, as occasion shall require, to demand entrance, and enter, at all seasonable *hours in the daytime, into the shops or outhouses of any person or persons employed by him or them to [*394]

(*e*) As to distribution of the penalty, see ante, p. 385, note (*x*).

work up any of the said materials, or other place or places where the work shall be carried on, and there to inspect the state and condition of such materials; and in case of refusal by any such person or persons so employed to permit such entrance or inspection, he, she, or they so refusing shall forfeit and pay such sum of money, not exceeding forty shillings nor less than ten shillings, as the justices before whom he, she, or they shall be convicted shall think proper, to be recovered and applied in the same manner as is by this act directed for the misdemeanor of being in the possession of any such materials without being able to account satisfactorily for such possession.

16. And whereas the said recited act of the twenty-second year of the reign of his late majesty king George the Second contains no provision for the protection and recovery of the tools and implements with which any person or persons employed in preparing, working up, or manufacturing such materials as aforesaid shall be intrusted for that purpose, nor any provision in respect to the drugs and ingredients used in dyeing, preparing, or manufacturing such of the said materials as are usually dyed, prepared or manufactured; be it therefore enacted, that from and after the said first day of July one thousand seven hundred and seventy-seven every penalty or punishment directed by or other provision contained in the said recited act in respect to the said materials, so far as the said recited act is not varied by this act, and all the provisions in this act contained in respect to the said materials, shall extend and be applicable to any tool or tools and implement or implements, with which any person or persons shall be intrusted for making, working up, or manufacturing the said materials, and also to any drug or drugs, ingredient or ingredients, with which any person or persons shall be intrusted, for the purpose of dyeing, preparing, or manufacturing such of the aforesaid materials as are usually dyed, prepared, or manufactured, in the same manner as if the said tools and implements, drugs, and ingredients were particularly mentioned both in the said recited act and in the preceding provisions of this act.

[*395] 17. And whereas journeymen dyers,(*f*) servants, and *apprentices frequently abuse the trust reposed in them, by dyeing goods for their own profit, without the consent of their masters; be it therefore enacted, that from and after the said first day of July one thousand seven hundred and seventy-seven, if any person hired, retained, or employed as a journeyman dyer, or as a servant or apprentice, in the dyeing of any felt or hat, or any woollen, linen, fustian, cotton, leather, fur, flax, mohair, or silk materials, whether the same shall be wrought or unwrought, or shall be mixed or unmixed with other of the said materials, shall, without the consent of the master, person, or persons by whom such journeyman, servant, or apprentice shall be hired, retained, or employed, wil-

(*f*) This act is not repealed as to *dyers* by 6 & 7 Vict. c. 40; see sec. 34, which confines that act to *manufactures:* see 11 Q. B. 941. Where a dyer permitted his servants to use his dye, &c., for their own materials and such as he entrusted them with, but they made a profit by using them for other materials without his knowledge, and there was no proof of a conspiracy besides the concurrence in that act; it was held, that assuming the act itself to be a larceny, the servants might still be convicted of the conspiracy as a distinct offence; Reg. v. Button, 11 Q. B. 929.

fully dye any of the said materials, whether wrought or unwrought, or mixed or unmixed with other of the said materials, or without such consent shall wilfully receive any such materials as aforesaid, for the purpose of dyeing the same, whether the same shall be dyed or prepared for dyeing, he or she so guilty of either of the said offences shall for the first offence forfeit the sum of ten shillings, and for the second offence the sum of twenty shillings, and for every subsequent offence the sum of forty shillings; or if any person shall procure any such materials as aforesaid to be dyed by any person so hired, retained, or employed as a journeyman, servant, or apprentice, without the consent of his or her master or employer, or shall offer any such materials to any such journeyman, servant, or apprentice, for the purpose aforesaid, he or she so offending, being thereof lawfully convicted by the oath or (being of the people called Quakers) affirmation of one or more credible witness or witnesses, before two or more justices of the peace for the county, riding, division, city, liberty, town, or place where the offence shall be committed, shall for the first offence forfeit the sum of five shillings, and for the second offence the sum of twenty shillings, and for every subsequent offence the sum of four pounds; and each of the said penalties shall be paid to the informer or informers, and in case of non-payment on conviction the person so convicted shall be committed by the justices before whom the conviction shall be to the common goal or house of correction, to remain for any time not exceeding one month, as such justice shall order and direct.

18. Provided always, and be it further enacted, that any inhabitant of any parish, township, or place in which any offence shall be committed contrary to the act of the twelfth year of the reign of his late Majesty King George the First, or contrary to the act of the twenty-second year of his late Majesty King George the Second, or contrary to this act, shall be deemed a competent witness, notwithstanding his or her being an inhabitant of such parish, township, or place.

*19. And be it further enacted by the authority aforesaid, that it shall and may be lawful to and for any one justice of the peace [*396] of any county, riding, division, city, liberty, town, or place, and he is hereby required, upon complaint to him made upon oath or (if the person complaining be of the people called Quakers) solemn affirmation, of any offence committed against this act, within the same county, riding, division, city, liberty, town, or place, to issue his warrant for apprehending, and bringing before any two or more justices of the peace of the same county, riding, division, city, liberty, town, or place, the person or persons charged with such offence; and the justices before whom such person or persons shall be brought are hereby authorized and required to hear and determine the matter of such complaint, and to proceed to judgment and conviction thereupon.

20. And whereas the said act of the twenty-second year of the reign of his late Majesty King George the Second only gives an appeal from an order of any justice or justices of the peace to the general or general quarter sessions of the peace where an order is made by any justice or justices of the peace in the case of the buyer or receiver of such purloined or embezzled materials as aforesaid, and in respect to the sale or disposal of such mate-

rials found on searching by warrant, after any conviction for purloining or embezzling, or for receiving or buying such purloined or embezzled materials; and whereas it is thought more proper to give a right of appealing in the case of other orders of any justice or justices of the peace to be made by force of an act made in the twelfth year of the reign of his late Majesty King George the First, (intituled "An Act to prevent unlawful Combinations of Workmen employed in the Woollen Manufactures, and for better payment of their Wages,")(*g*) and of the said act, and also in the case of all orders to be made by any justices of the peace under this act; be it therefore further enacted, that if any person shall think himself or herself aggrieved by the order or judgment of any two justices before whom he or she shall have been convicted of any of the offences in the said acts of the twelfth year of the reign of King George the First and the twenty-second year of the reign of King George the Second, or in this act, such person may appeal, and the said justices are hereby required to make known to such person, at the time of such conviction his or her right to appeal,(*h*) to the next general or general [*397] quarter sessions of the peace to be holden for the *county, riding, division, city, liberty, town, or place where such conviction shall have been made (such person at the time of such conviction giving to such justices notice in writing of his or her intention to appeal, and also entering into a recognizance, at the time of such notice, with sufficient sureties, conditioned to try such appeal, and to abide the judgment of and pay such costs as shall be awarded by the justices at such sessions;) but if the person giving such notice of appeal shall not at the time of giving such notice enter into such recognizance as aforesaid, then the justices to whom such notice of appeal shall have been given shall and may commit such person or persons to the house of correction or other public prison of such county, riding, division, city, liberty, town, or place, there to remain until the said next general or general quarter sessions of the peace to be holden in and for such place, unless such recognizance shall be sooner entered into;(*i*) and the said justices before whom such conviction shall have been made, or any other two or more justices of the same county, riding, division, city, liberty, town, or place, are hereby empowered and required to take, and the justices at such sessions are hereby authorized and required, upon due proof made of such notice of appeal,

(*g*) As to wages see 1 & 2 Wm. 4, c. 37, post.

(*h*) If they make known to a party convicted his right to appeal, and he declines appealing, they need not proceed to inform him of the necessary steps to be taken in order to appeal; Rex v. Justices of West Riding of Yorkshire, 3 M. & S. 494.

(*i*) Where a party convicted under this act gave notice of appeal, and was committed for not entering into recognizance, and by the practice of the sessions the appeal was to be entered and the order for hearing it obtained by the party disputing the conviction; but the party not having entered the appeal the sessions discharged him; semble, that the convicting magistrates had no longer power to commit in execution of the conviction; but at any rate no *mandamus* should be granted to compel them to do so; Reg. v. Twyford, 5 A. & E. 430; but see Reg. v. Bolton, infra. A party convicted under sect. 8, entered into recognizance and gave notice of appeal, which he afterwards abandoned. At the sessions, the respondents applied to enter the appeal, and for their costs incurred by not receiving notice of abandonment: held, on motion for *mandamus*, that the Recorder acted properly in refusing both applications; Reg. v. Recorder of Bolton, 2 D. & L. 510.

either by the acknowledgment of the justices to whom the same shall have been given, or otherwise, to hear and determine the matter of the said appeal, and to award such costs as to them shall appear just and reasonable to be paid by either party; and if upon the hearing of such appeal the judgment of the justices before whom the appellant shall have been convicted shall be affirmed, such appellant shall, within forty-eight hours next after the same shall be so affirmed, suffer such corporal punishment as shall *have been directed to be inflicted upon him or her for the offence whereof he or she shall have been convicted, or shall [*398] immediately pay the sum which he or she shall have been adjudged to forfeit, together with such costs as the justices in the said sessions shall award to be paid by him or her, for defraying the expenses sustained by the defendant or defendants in such appeal, or in default of making such payments shall be committed to the common gaol or house of correction, in the same manner and for the same time, to be computed from the affirmance of such conviction, as shall be directed by the original judgment of conviction, unless the person or persons so convicted shall have been imprisoned under the original conviction, in which case the time for which such person or persons shall have been so confined shall be included in the order of confirmation.

21. And whereas an act passed in the twenty-third year of the reign of his late Majesty King George the Second, (intituled "An Act for the more effectual punishing of Persons convicted of seducing Artificers in the Manufactures of Great Britain or Ireland out of the Dominions of the Crown of Great Britain; and to prevent the Exportation of Utensils made use of in the Woollen and Silk Manufactures from Great Britain or Ireland into Foreign Parts; and for the more easy and speedy Determination of Appeals allowed in certain Cases by an Act made in the last Session of Parliament, relating to Persons employed in the several Manufactures therein mentioned") prescribes a form for conviction of the several offences mentioned in the said recited act of the twenty-second of George the Second, but such form is not adapted to the said last mentioned act as altered by this act; and it may be useful to have one general form for the said recited act of the twenty-second of George the Second and this act; be it therefore further enacted, that in respect to all offences which from and after the said first day of July one thousand seven hundred and seventy-seven shall be committed against the said recited act of the twenty-second of George the Second, so much of the said act of the twenty-third of George the Second as prescribes a form of conviction for offences against the said act of the twenty-second of George the Second shall be repealed; and that from and after the said first day of July one thousand seven hundred and seventy-seven the justices before whom any offender shall be convicted of any offence, either against the said act of the twenty-second of George the Second, or varied by this act, or against this act, shall cause the conviction to be certified to the next general or general quarter sessions of the peace to be held in and for the county, riding, division, city, liberty, town, or place where such conviction was made, to be filed with the record of such sessions; and such conviction shall and may be drawn up and written on parchment, and certified in the following form

[*399] *or words, as far as the name of the person and the nature of the case will admit of; (that is to say),

Form of Conviction.(*k*)

'Middlesex, (*or any other place, as the case shall be*), to wit. } BE it remembered, that on the day of in the year of our Lord A. B. was convicted before 'us of his Majesty's justices of the peace in and for the said 'county of *or* for the riding of the said county of *or* 'for the city, liberty, town, or place aforesaid, in the said county '(*as the case shall be*) of [*here specify the offence, and when and 'where the same was committed*]. Given under our hands and seals the 'day and year first above written.'

22. Provided always, and be it further enacted, that no order made, touching or concerning any of the matters in this act contained, or any proceedings to be had touching the conviction of any offender or offenders against the said act of the twenty-second of George the Second, or this act, shall be quashed for want of form, or be removed or removeable by certiorari into his Majesty's Court of King's Bench;(*l*) and the justices before whom such convictions shall be had shall cause the same, drawn up in the form aforesaid, to be fairly written upon parchment, and transmitted to the next general or general quarter sessions of the peace to be held for the county, riding, division, city, liberty, town, or place wherein such conviction was had, to be filed and kept among the records of the said general or general quarter sessions; and in case the person or persons so convicted shall appeal from the judgment of the said justices to the said general or general quarter sessions, the justices on such general or general quarter sessions are hereby required, upon receiving the said conviction drawn up in the form aforesaid, to proceed to the hearing and determination of the matter of the said appeal, according to the direction of the said act, any law or usage to the contrary notwithstanding.

23. Provided also, and be it further enacted, that nothing herein contained shall extend or be construed to extend to repeal any former law or laws now in being for the punishment of any of the offences hereinabove specified, except so far as particularly expressed by this act; and no offender who shall have been proceeded against upon or by virtue of this act for any of the offences herein specified shall for the same offence be afterwards proceeded against upon or by virtue of any such former law or laws.

[*400] *24. Provided also, and be it further enacted, that nothing contained in this act shall extend to or affect any person or persons for any offence committed or to be committed against the said recited act of the twenty-second year of the reign of his late Majesty King George the Second, before the said first day of July one thousand seven hundred and seventy-seven, but all and every such offender and offenders

(*k*) See Reg. v. Wilcock, 7 Q. B. 317; In re Boothroyd, 15 M. & W. 1; 11 & 12 Vict. c. 43.

(*l*) This sect. takes away the writ of certiorari only from offences for the first time created by 22 Geo. 2, c. 27, and does not apply to those created by 12 Geo. 1, c. 34, and extended to the silk and cotton trades by 22 Geo. 2, c. 27; Rex v. Rogers, 5 B. & Ald. 773. See further, 6 & 7 Vict. c. 40, post.

shall and may be prosecuted and punished in the same manner as if this act had not been made.

25. And be it further enacted, that if any suit or action shall be commenced or prosecuted against any person or persons for any thing done or to be done in pursuance of this act, every such suit or action shall be severally brought, laid and tried in the county or place where the fact was committed, and not elsewhere; and the defendant or defendants in every such action or suit shall and may plead the general issue, and give this act and the special matter in evidence, at any trial to be had thereupon, and that the same was done in pursuance of and by the authority of this act; and if it shall appear to be so done, or if any such suit or action shall be brought in any other county or place than where the fact was committed, then the jury shall find for the defendant or defendants; and upon such verdict, or if the plaintiff or plaintiffs shall become nonsuit, or discontinue his, her, or their action after the defendant or defendants shall have appeared, or if upon demurrer judgment shall be given against the plaintiff or plaintiffs, the defendant or defendants shall and may recover treble costs, and have the like remedy for the same as any defendant or defendants hath or have for costs in other cases at law.

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42 Geo. 3, c. 73.

An Act for the Preservation of the Health and Morals of Apprentices and others, employed in Cotton and other Mills, and Cotton and other Factories. [22 June, 1802.]

Whereas it hath of late become a practice in cotton and woollen mills, and in cotton and woollen factories, to employ a great number of male and female apprentices, and other persons, in the same building in consequence of which certain regulations are become necessary to preserve the health and morals of such apprentices and other persons; be it therefore enacted by the King's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same. That, from and after the second day of December, one thousand *eight hundred and two, all such mills and factories within Great Britain [*401] and Ireland, wherein three or more apprentices, or twenty or more other persons, shall at any time be employed, shall be subject to the several rules and regulations contained in this act; and the master or mistress of every such mill or factory is hereby strictly enjoined and required to pay due attention to and act in strict conformity to the said rules and regulations.

2. And be it enacted, that all and every the rooms and apartments in or belonging to any such mill or factory shall, twice at least in every year, be well and sufficiently washed with quick lime and water over

every part of the walls and ceiling thereof;(*m*) and that due care and attention shall be paid by the master or mistress of such mills or factories, to provide a sufficient number of windows and openings in such rooms or apartments, to insure a proper supply of fresh air in and through the same.

3. And be it further enacted, that every such master or mistress shall constantly supply every apprentice, during the term of his or her apprenticeship, with two whole and complete suits of clothing, with suitable linen, stockings, hats, and shoes; one new complete suit being delivered to such apprentice once at least in every year.

4. And be it further enacted, that no apprentice that now is or hereafter shall be bound to any such master or mistress, shall be employed or compelled to work for more than twelve hours in any one day, (reckoning from six of the clock in the morning to nine of the clock at night), exclusive of the time that may be occupied by such apprentice in eating the necessary meals; provided always, that, from and after the first day of June one thousand eight hundred and three, no apprentice shall be employed or compelled to work upon any occasion whatever between the hours of nine of the clock at night and six of the clock in the morning.(*n*)

5. And be it further enacted, that in any mill or factory, wherein not less than one thousand nor more than fifteen hundred spindles are constantly used in the carrying on of the manufacture, it shall and may be lawful for the owner or owners of such mill to employ his apprentices in the night until the twenty-fifth day of December one thousand eight hundred and three; and in any mill or factory wherein more than fifteen hundred spindles shall be employed, it shall and may be [*402] lawful for the owner of *such mill to employ his apprentices in the night until the twenty-fifth day of June one thousand eight hundred and four; any thing herein contained to the contrary notwithstanding.

6. And be it further enacted, that every such apprentice shall be instructed in some part of every working day, for the first four years at least of his or her apprenticeship, which shall next ensue from and after the second day of December one thousand eight hundred and two, if he or she is an apprentice on the said second day of December one thousand eight hundred and two, and for the first four years at least of his or her apprenticeship, if his or her apprenticeship commences at any time after the said second day of December one thousand eight hundred and two, in the usual hours of work, in reading, writing, and arithmetick, or either of them, according to the age and abilities of such apprentice, by some discreet and proper person, to be provided and paid by the master or mistress of such apprentice, in some room or place in such mill or factory to be set apart for that purpose: and that the time hereby

(*m*) See further, 3 & 4 Wm. 4, c. 103, s. 26; 7 & 8 Vict. c. 15, ss. 18 and 58, post.

(*n*) As to time of working, see further 3 & 4 Wm. 4, c. 103; 7 & 8 Vict. c. 15; 8 & 9 Vict. c. 29; 10 & 11 Vict. c. 29, post; Ryder v. Mills, 3 Exc. 853; 13 & 14 Vict. c. 54, post.

directed to be allotted for such instruction as aforesaid, shall be deemed and taken on all occasions as part of the respective periods limited by this act during which any such apprentice shall be employed or compelled to work.

7. And be it further enacted, that the room or apartment in which any male apprentice shall sleep, shall be entirely separate and distinct from the room or apartment in which any female apprentice shall sleep; and that not more than two apprentices shall in any case sleep in the same bed.

8. And be it further enacted, that every apprentice, or (in case the apprentices shall attend in classes,) every such class, shall, for the space of one hour at least every Sunday, be instructed and examined in the principles of the Christian religion, by some proper person to be provided and paid by the master or mistress of such apprentice; and in England and Wales, in case the parents of such apprentice shall be members of the Church of England, then such apprentice shall be taken, once at least in every year during the term of his or her apprenticeship, to be examined by the rector, vicar, or curate of the parish in which such mill or factory shall be situate; and shall also, after such apprentice shall have attained the age of fourteen years and before attaining the age of eighteen years, be duly instructed and prepared for confirmation, and be brought or sent to the bishop of the diocese to be confirmed, in case any confirmation shall, during such period, take place in or for the said parish; and in Scotland, where the parents of such apprentice shall be members of the Established Church, such apprentice shall be taken, once at least in every year, during the term of his or her apprenticeship to be examined by the minister of the parish; and shall after such apprentice shall have attained the age of fourteen years, and before attaining the age of eighteen years, be carrried to the parish church to receive the sacrament of the Lord's Supper, as the *same is administered in churches in Scotland; and such master or mistress shall send all his or her apprentices under the care of [*403] some proper person, once in a month at least, to attend during divine service in the church of the parish or place in which the mill or factory shall be situated, or in some other convenient church or chapel where service shall be performed according to the rites of the Church of England, or according to the established religion in Scotland, as the case may be, or in some licensed place of divine worship; and in case the apprentices of any such master or mistress cannot conveniently attend such church or chapel every Sunday, the master or mistress, either by themselves or some proper person, shall cause divine service to be performed in some convenient room or place in or adjoining to the mill or factory, once at least every Sunday that such apprentices shall not be able to attend divine service at such church or chapel; and such master or mistress is hereby strictly enjoined and required to take due care that all his or her apprentices regularly attend divine service, according to the directions of this act.

9. And be it further enacted, that the justices of the peace for every county, stewartry, riding, division, or place, in which any such mill or factory shall be situated, shall, at the Midsummer sessions of the peace

to be holden immediately after the passing of this act for such county, stewartry, riding, division, or place, and afterwards yearly at their annual Midsummer sessions of the peace, appoint two persons, not interested in, or in any way connected with, any such mills or factories, to be visitors of such mills or factories in such county, stewartry, riding, division, or place; one of whom shall be a justice of peace for such county, stewartry, riding, division, or place, and the other shall be a Clergyman of the Established Church of England or Scotland, as the case may be; and in case it shall be found inconvenient to appoint one such justice and one such clergyman as aforesaid, it shall be lawful to and for such justices, and they are hereby required to appoint two such justices, or two such clergymen; and the said visitors, or either of them, shall have full power and authority, from time to time throughout the year, to enter into and inspect any such mill or factory at any time of the day, or during the hours of employment, as they shall think fit; and such visitors shall report from time to time in writing to the quarter sessions of the peace the state and condition of such mills and factories, and of the apprentices therein, and whether the same are or are not conducted and regulated according to the directions of this act and the laws of the realm; and such report shall be entered by the clerk of the peace among the records of the session in a book kept for that purpose: provided always, that in case there shall be six or more such mills or factories within any one such county, riding, division, or place, then it shall be lawful for such justices to divide [*404] such county, riding, division, or place into two or more *districts or parts, and to appoint two such visitors as aforesaid for each of such districts or parts.(o)

10. And be it further enacted, that in case the said visitors or either of them shall find that any infectious disorder appears to prevail in any mill or factory as aforesaid; it shall be lawful for them or either of them to require the master or the mistress of any such mill or factory to call in forthwith some physician, or other competent medical person, for the purpose of ascertaining the nature and probable effects of such disorder, and for applying such remedies and recommending such regulations as the said physician, or other competent medical person shall think most proper, for preventing the spreading of the infection and for restoring the health of the sick; and that such physician, or other competent medical person, shall report to such visitors, or either of them, as often as they shall be required so to do, their opinion in writing of the nature, progress, and present state of disorder, together with its probable effects; and that any expenses incurred in consequence of the provisions aforesaid for medical assistance, shall be discharged by the master or mistress of such mill or factory.

11. And be it further enacted, that if any person or persons shall oppose or molest any of the said visitors in the execution of the powers intrusted to them by this act, every such person or person shall for every such offence forfeit and pay any sum not exceeding ten pounds nor less than five pounds.(p)

(o) See further, 3 & 4 Wm. 4, c. 103, s. 17, post.

(p) See also 3 & 4 Wm. 4, c. 103, s. 32; 7 & 8 Vict. c. 15, s. 61; 8 & 9 Vict. c. 29, ss. 41, 42, post.

12. And be it further enacted, that the master or mistress of every such mill or factory shall cause printed or written copies of this act to be hung up and affixed in two or more conspicuous places in such mill or factory, and shall cause the same to be constantly kept and renewed, so that they may at all times be legible and accessible to all persons employed therein.(*q*)

13. And be it further enacted, that every master or mistress of any such mill or factory who shall wilfully act contrary to or offend against any of the provisions of this act, shall for such offence (except where otherwise directed) forfeit and pay any sum not exceeding five pounds nor less than forty shillings, at the discretion of the justice before whom such offender shall be convicted as after mentioned; one-half whereof shall be paid to the informer, and the other half to the overseers of the poor in England and Ireland, and to the ministers and elders in Scotland, of the parish or place where such offence shall be committed, to be by them applied in aid of the poor rate in England and Ireland, and for the benefit of the poor in Scotland, of such parish *or place; provided always, that all information for offences against this act [*405] shall be laid in one calendar month after the offence committed, and not afterwards.

14. And be it further enacted, that every such master or mistress shall, at the Ephiphany sessions in every year, make, or cause to be made, an entry in a book to be kept for that purpose by the clerk of the peace of the county, riding, or division in which any mill or factory shall be situate, of every such mill or factory occupied by him or her wherein three or more apprentices, or twenty or more other persons shall be employed; and the said clerk of the peace shall receive for every such entry the sum of two shillings and no more.

15. And be it further enacted, that all offences for which any penalty is imposed under this act, shall and may be heard before any two or more justices of the peace, acting in or for the place where the offence shall be committed; and all penalties and forfeitures by this act imposed, and all costs and charges attending the conviction of any such offender or offenders, shall and may be levied by distress and sale of the offender's goods and chattels, by warrant under the hand and seal of any two or more justices of the peace acting for the county, stewartry, riding, division, or place where such offence shall be committed, rendering the overplus (if any) to the party or parties offending; and which warrant such justices are hereby empowered and required to grant, upon conviction of the offender, either by confession, or upon the oath of one or more credible witness or witnesses (which oath such justices are hereby empowered to administer;) and in case such distress cannot be found, and such penalties, forfeitures, and costs shall not be forthwith paid, it shall and may be lawful for such justices, and they are hereby empowered and required, by warrant under their hands and seals, to commit such offender or offenders to the common goal or house of correction of the county, stewartry, riding, division, or place where the offence shall be committed, for

(*q*) See also 3 & 4 Wm. 4, c. 103, s. 27; 7 & 8 Vict. c. 15, s. 28; 8 & 9 Vict. c. 29 s. 29, post.

any time not exceeding two calendar months, unless the said penalty, forfeiture, and costs shall respectively be sooner paid and satisfied: provided always, that no warrant of distress shall be issued for levying any such penalty, forfeiture, or costs, until six days after the offender shall have been convicted, and an order made upon him or her for payment thereof; and no such conviction shall be removable by certiorari or bill of advocation into any Court whatsoever.

16. And be it further enacted, that every such conviction before such justice may be made in the following form, to wit:

Form of Conviction.(*r*)

"*County of* } BE it remembered, that on the day of
to wit. } in the year A. B. was, upon the
[*406] complaint of C. D., convicted before *of the justices
of the peace for the said county of [*or*, for of
or in the said county of *as the case shall happen to be*,] in pursuance of an act, passed in the forty-second year of the reign of his Majesty King George the Third, for [or, *as the case may be.*] Given under our hands and seals, the day and year above written."

Which conviction shall be certified to the next general quarter sessions, there to be filed amongst the records of the county, riding, or division.

17. And be it enacted, that this act shall be deemed and taken to be a public act, and shall be judicially taken notice of as such, by all judges, justices, and others, without specially pleading the same.

SCHEDULE TO 5 GEO. 4, C. 96.

Form of Award to be written at the Foot or upon the Back of the Order of the Justices of Peace certifying the Reference.

We, I. K. and L. M. [*name and describe the referees,*] the referees appointed to settle the matters in dispute between the parties within named [*or*, I. K., one of the referees so appointed; *or*, L. M. the other referee so appointed, having failed to attend; *or*, I. N. O., the justice, *as the case may be;*) do hereby determine and adjudge that [*here set forth the determination; to which the referee or referees or justice, as the case may be, shall subscribe their names.*]

Form of Endorsement, extending the Time limited for making the Award.

We, A. B. and C. D., parties to the within reference, do hereby agree to extend the same to the day of inclusive. Witness our hands this day of

A. B.
C. D.

Witness,

(*r*) See 11 & 12 Vict. c. 43.

Form of Acknowledgment of Fulfilment of the Award, to be written at the Foot or on the Back thereof.

I, A. B., do hereby acknowledge that the above award hath been fulfilled by C. D., who is hereby discharged of the same. Witness my hand this day of

Witness, A. B.

**Form of the Oath to be administered by the Arbitrators or Justice to the Parties and Witnesses under this Act* [*407]

The evidence that you shall give before us, the arbitrators appointed by A. B. and C. D. [*the parties*] to determine the matters in difference between them under and by virtue of an act passed in the fifth year of the reign of King George the Fourth, intituled, "An Act to consolidate and amend the Laws relative to the Arbitration of Disputes between Masters and Workmen," shall be the truth, the whole truth, and nothing but the truth. So help you God.

Form of Commitment of a Person summoned as a Witness before the Arbitrators.

Whereas proof on oath hath been made before me, one of his Majesty's justices of the peace for the county [*or*, riding, stewartry, division, city, burg, liberty, town, or place] of on this day of that A. B. hath been duly summoned and hath neglected to appear and give evidence before C. D. and E. F., the arbitrators appointed by and between G. H. and I. K. to determine the matters in dispute between them, at in the county [*or*, riding, stewartry, division, city, burgh, liberty, town or place]of on the day of under and by virtue of an act made in the fifth year of the reign of his present Majesty, intituled "An Act" [*here set forth the title of this act*,(*s*)] and the said A. B. being required by me, the said justice, to give evidence before the said arbitrators, and still refusing so to do, therefore I, the said justice, do hereby, in pursuance of the said act, commit the said A. B. to the [*describing the prison and the house of correction*,] there to remain, without bail or mainprize for his [*or* her] offence aforesaid, until he [*or* she] shall submit himself [*or* herself] to be examined and give his [*or* her] evidence before the said arbitrators touching the matters referred to them as aforesaid, or shall otherwise be discharged by due course of law: And you, the [*constable or other peace officer or officers to whom the warrant is directed*,] are hereby authorized and required to take into your custody the body of the said A. B., and him [*or* her] safely to convey to the said prison [*or* house of correction,] and him [*or* her] there to deliver to the gaoler [*or* keeper] thereof, who is hereby authorized and required to receive into his custody the body of the said A. B., and him [*or* her] safely to detain and keep pursuant to this commitment. Given under
*my hand this day of in the year of our Lord [*408]

(*s*) See last form, supra.

[This commitment to be directed to the proper peace officer and the gaoler [*or* keeper] of the prison [*or* house of correction.]

Form of Warrant of Distress.

To the constable of

Whereas of under an award made by on the day of in the year of our Lord pursuant to an act passed in the fifth year of the reign of his present Majesty, intituled "An Act" [*state the title of this act*,(*t*)] is liable to pay to of the sum of and also the sum of and the said having refused or neglected to pay the same for the space of two days and upwards subsequent to the making of such award, these are therefore to command you to levy the said sum of by distress and sale of the goods and chattels of the said and I do hereby order and direct the goods and chattels so to be distrained to be sold and disposed of within days, unless the said sum of for which such distress shall be made, together with the reasonable charges of taking and keeping such distress, shall be sooner paid: and you are also hereby commanded to certify to me what you shall do by virtue of this my warrant. Given under my hand and seal at the day of

Form of the Constable's Return to the Warrant of Distress.

I constable of do hereby certify to justice of the peace of that I have made diligent search for, but do not know of, nor can find any goods and chattels of by distress and sale whereof I may levy the sum of pursuant to his warrant for that purpose. Dated the day of in the year of our Lord Given under my hand this day of in the year of our Lord.

Form of Commitment thereupon to the House of Correction.

Here name the county. } To the constable of and also to the keeper of the house of correction at.

Whereas of under an award made by *on [*409] the day of in the year of our Lord pursuant to an act passed in the fifth year of the reign of his present Majesty, intituled an act [*state the title of this act*,(*t*)] became liable to pay to the sum of and also the sum of for costs, time, and expenses, making together the sum of and having refused or neglected to pay the same for the space of two days and upwards subsequent to the making of such award, my warrant was according to the provisions of the said act duly made and issued for the levying the said sum of by distress and sale of the goods and chattels of the said and whereas it appears by the return of constable of

(*t*) See form, supra.

dated the day of that he hath made diligent search for, but doth not know of, nor can find any goods and chattels of the said by distress and sale whereof the said sum of may be levied pursuant to my said warrant. These are therefore to command you the said constable of to apprehend the said and convey him to the said house of correction at aforesaid and deliver him there to the keeper of the said house of correction; and these are also to command you the keeper of the said house of correction to receive him the said into the said house of correction and there keep him without bail or mainprize for the space of months, unless the said sum of so ordered to be paid as aforesaid, shall be sooner satisfied, with all reasonable expenses. Given under my hand and seal at the day of

Form of Commitment where the Warrant of Distress is withheld.

Here name the county. } To the constable of and also to the keeper of the house of correction at

Whereas of under an award made by on the day of in the year of our Lord pursuant to an act passed in the fifth year of the reign of his present Majesty, intituled "An Act" [*state the title of this act*,(*t*)] became liable to pay to the sum of and also the sum of for costs, time and expenses, making together the sum of which he has refused or neglected to pay for the space of two days and upwards subsequent to the making of such award; and whereas it appears to me that the recovery of such sum and warrant of distress, and sale of the goods and chattels of the said will be attended with consequence ruinous or in an especial manner injurious to the defaulter [and his family, *if any*,] and I have therefore determined to withhold such warrant and to commit the said *to prison pursuant to the said act: [*410] These are therefore to command you the said constable of to apprehend the said and convey him to the said house of correction at aforesaid, and deliver him there to the keeper of the said house of correction; and these are also to command you the keeper of the said house of correction to receive him the said into the said house of correction, and there keep him without bail or mainprize for the space of months, unless the said sum of so ordered to be paid as aforesaid shall be sooner satisfied with all reasonable expences. Given under my hand and seal at the day of

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SCHEDULE TO 6 GEO. 4, c. 129.

Form of Conviction and Commitment.

Be it remembered that on the day of in the year of his Majesty's reign, and in the year of our Lord A. B.

(*t*) See supra.

is convicted before us [*naming the justices,*] two of his Majesty's justices of the peace for the county [*or* riding, division, city, liberty, town, or place] of of having [*stating the offence*] contrary to the act made in the sixth year of the reign of King George the Fourth, intituled "An Act to repeal the Laws relating to the Combination of Workmen, and to make other Provisions in lieu thereof," and we the said justices do hereby order and adjudge the said A. B. for the said offence to be committed to and confined in the common gaol for the said county [*or* riding, division, city, liberty, town, or place] for the space of *or* to be committed to the house of correction at within the said county [*or* riding, division, city, liberty, town, or place] there to be kept to hard labour for the space of . Given under our hands the day and year above written.

Form of Commitment of a Person summoned as a Witness.

Whereas C. D. hath been duly summoned to appear and give evidence before us [*naming the justices who issued the summons*] two of his Majesty's justices of the peace for the county [*or* riding, division, city, liberty, town, or place] of on this day of at being the time and place appointed for hearing and determining the complaint made by [*the informer or prosecutor*] before us against A. B., of having [*stating the offence as laid in the information*] contrary to the *act made [*411] in the sixth year of the reign of King George the Fourth, intituled "An Act" [*here insert the title of this act* :(*u*)] And whereas the said C. D. hath not appeared before us at the time and place aforesaid specified for that purpose, or offered any reasonable excuse for his [*or* her] default [*or*, and whereas the said C. D. having appeared before us at the time and place aforesaid specified for that purpose, hath not submitted to be examined as a witness and give his [*or* her] evidence before us touching the matter of the said complaint but hath refused so to do, therefore we the said justices do hereby in pursuance of the said statute commit the said C. D. to the [*describing the prison*] there to remain without bail or mainprize for his [*or* her] contempt aforesaid for three calendar months or until he [*or* she] shall submit himself [*or* herself] to be examined and give his [*or* her] evidence before us touching the matter of the said complaint or shall otherwise be discharged by due course of law: And you the [*constable or other peace officer or officers to whom the warrant is directed*] are hereby authorized and required to take into your custody the body of the said C. D. and him [*or* her] safely to convey to the said prison and him [*or* her] there to deliver to the gaoler or keeper thereof, who is hereby authorized and required to receive into his custody the body of the said C. D., and him [*or* her] safely to detain and keep pursuant to this commitment. Given under our hands this day of in the year of our Lord .

[This commitment to be directed to the proper peace officer, and the gaoler or keeper of the prison.]

(*u*) See last form.

1 & 2 Wm. 4, c. 37.

An act to prohibit the Payment, in certain Trades, of Wages in Goods, or otherwise than in the current Coin of the Realm. [15th October, 1831.]

Whereas it is necessary to prohibit the payment, in certain trades, of wages in goods, or otherwise than in the current coin of the realm; be it therefore enacted by the king's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, that in all contracts hereafter to be made for the hiring of any artificer in any of the trades hereinafter enumerated, or for the performance by any artificer of any labour in any of the said trades, the wages of such artificer shall be made payable in the current coin of this realm only, and not otherwise; and that if in any such contract the whole or any part of such wages shall be made payable in *any manner other than in the current coin aforesaid, such contract shall be and is hereby declared illegal, null, and void.(*u*) [*412]

2. And be it further enacted, that if in any contract hereafter to be made between any artificer in any of the trades hereinafter enumerated, and his employer, any provision shall be made directly or indirectly respecting the place where, or the manner in which, or the person or persons with whom, the whole or any part of the wages due or to become due to any such artificer shall be laid out or expended, such contract shall be and is hereby declared illegal, null, and void.

3. And be it further enacted, that the entire amount of the wages earned by or payable to any artificer in any of the trades hereinafter enumerated, in respect of any labour by him done in any such trade, shall be actually paid to such artificer in the current coin of this realm, and not

(*u*) Plaintiff, a framework knitter, worked as a weaver of gloves for defendant in frames provided by defendant at an agreed gross price per dozen pairs. Defendant was a sub-contractor, furnishing the work by agreement to a master manufacturer, who found machinery and materials. Defendant settled with plaintiff weekly for the work done, deducting out of the gross price per dozen certain charges which were according to the known custom of the trade, namely: 1. A frame-rent per week; 2. A payment per week for use of defendant's premises to work in, standing room for the frame, defendant's trouble and loss of time in procuring materials and conveying them to plaintiff, defendant's responsibility to the master manufacturer under whom he contracted for the work, superintendence of the work, sorting the goods when made, and delivering them to the master manufacturer; 3. Payment to a boy for winding the yarn, and wear and tear of machinery; 4. A penny per shilling on the net sum earned by plaintiff above fourteen shillings per week as compensation to defendant for a per centage paid by him to the master manufacturer on the amount of goods manufactured by defendant for him with machinery rented of him by defendant. There was no written contract between plaintiff and defendant: held, that the agreement to pay plaintiff's wages with these deductions was not a contract to pay part of such wages otherwise than in the current coin of the realm, within this sect.; nor was contract in writing under sect. 23, necessary to legalize such deductions: held, also, that there was not in this case any demise of a "tenement" within sect. 23; and *quere*, whether there was a demise of anything at a rent thereon reserved within that sect.; Chawner v. Cummings, 8 Q. B. 311.

otherwise; and every payment made to any such artificer by his employer, [*413] of or in respect *of any such wages, by the delivering to him of goods or otherwise than in the current coin aforesaid, except as hereinafter mentioned, shall be and is hereby declared illegal, null, and void.

4. And be it further enacted, that every artificer in any of the trades hereinafter enumerated shall be entitled to recover from his employer in any such trade, in the manner by law provided for the recovery of servant's wages, or by any other lawful ways and means, the whole or so much of the wages earned by such artificer in such trade as shall not have been actually paid to him by such his employer in the current coin of this realm.(*v*)

5. And be it further enacted, that in an action, suit, or other proceeding to be hereafter brought or commenced by any such artificer as aforesaid, against his employer, for the recovery of any sum of money due to any such artificer as the wages of his labour in any of the trades hereinafter enumerated, the defendant shall not be allowed to make any set-off, nor to claim any reduction of the plaintiff's demand, by reason or in respect of any goods, wares, or merchandize had or received by the plaintiff as or on account of his wages or in reward for his labour, or by reason or in respect of any goods, wares, or merchandize sold, delivered, or supplied to such artificer at any shop or warehouse kept by or belonging to such employer, or in the profits of which such employer shall have any share or interest.(*w*)

6. And be it further enacted, that no employer of any artificer in any of the trades hereinafter enumerated shall have or be entitled to maintain any suit or action in any court of law or equity against any such artificer, for or in respect of any goods, wares, or merchandize sold, delivered, or supplied to any such artificer by any such employer, whilst in his employment, as or on account of his wages or reward for his labour, or for or in respect of any goods, wares or merchandize sold, delivered or supplied to such artificer at any shop or warehouse kept by or belonging to such employer, or in the profits of which such employer shall have any share or interest.

7. And be it further enacted, that if any such artificer as aforesaid, or his wife or widow, or if any child of any such artificer, not being of the full age of twenty-one years, shall become chargeable to any parish or place, and if within the space of three calendar months next before the time when any such charge shall be incurred such artificer shall have earned or have become entitled to receive any wages for any labour by him done in any of the said trades, which wages shall not have been paid to such artificer in the current coin of this realm, it shall be lawful for the overseers or overseer of the poor in such parish or place to recover from the employer of such artificer in whose service such labour was done the full amount of wages so unpaid, and to proceed for the recovery thereof [*414] by all such ways and *means as such artificer himself might have proceeded for that purpose; and the amount of the wages

(*v*) See Weaver v. Floyd, 21 L. J., N. S., Q. B. 151.
(*w*) See Riley v. Warden, 2 Exc. 59, post, p. 418, note.

which may be so recovered shall be applied in reimbursing such parish or place all costs and charges incurred in respect of the person or persons to become chargeable, and the surplus shall be applied and paid over to such person or persons.

8. Provided always, and be it further enacted, that nothing herein contained shall be construed to prevent or to render invalid any contract for the payment, or any actual payment, to any such artificer as aforesaid, of the whole or any part of his wages, either in the notes of the governor and company of the Bank of England, or in the notes of any person or persons carrying on the business of a banker, and duly licensed to issue such notes in pursuance of the laws relating to his majesty's revenue of stamps, or in drafts or orders for the payment of money to the bearer on demand, drawn upon any person or persons carrying on the business of a banker, being duly licensed as aforesaid, within fifteen miles of the place where such drafts or orders shall be so paid, if such artificer shall be freely consenting to receive such drafts or orders as aforesaid, but all payments so made with such consent as aforesaid, in any such notes, drafts, or orders as aforesaid, shall for the purposes of this act be as valid and effectual as if such payments had been made in the current coin of the realm.

9. And be it further enacted, that any employer or any artificer in any of the trades hereinafter enumerated, who shall, by himself or by the agency of any other person or persons, directly or indirectly enter into any contract or make any payment hereby declared illegal, shall for the first offence forfeit a sum not exceeding ten pounds nor less than five pounds, and for the second offence any sum not exceeding twenty pounds nor less than ten pounds, and in case of a third offence any such employer shall be and be deemed guilty of a misdemeanor, and, being thereof convicted, shall be punished by fine only, at the discretion of the court, so that the fines shall not in any case exceed the sum of one hundred pounds.

10. And be it further enacted, that all offences committed against this act, and not hereinbefore declared a misdemeanor, shall be inquired of and determined, and that all fines and penalties for such offences shall be sued for and recovered by any person or persons who shall sue for the same, before any two justices of the peace having jurisdiction within the county, riding, city, or place in which the offence shall have been committed; and that the amount of the fines, penalties, and other punishments to be inflicted upon any such offenders shall, within the limits hereinbefore prescribed, be in the discretion of such justices, or, in cases of misdemeanor, of the court before which the offence may be tried; and in case of a second offence against this act, it shall be sufficient evidence of the previous conviction and offence, if a certificate, signed by the clerk of *the peace or other officer having the custody of the record of such previous conviction shall be produced before the said justice [*415] inquiring of such second offence, in which certificate shall be stated in a compendious form the general nature of the offence for which such previous conviction was had, and the date of such previous conviction; and so in like manner, upon the trial of any indictment or information for

any such misdemeanor as aforesaid, it shall be sufficient evidence of such second conviction for a like offence if a certificate thereof, signed by the clerk of the peace or other officer having the custody of the record of such second conviction, in such form as aforesaid, be produced to the court and jury: provided always, that no person shall be punished as for a second offence under this act unless ten days at the least shall have intervened between the conviction of such person for the first and the conviction by(*w*) such person of the second offence, but each separate offence committed by any such person before the expiration of the said term of ten days shall be punishable by a separate penalty, as though the same were a first offence; and that no person shall be punished as for a third offence under this act, unless ten days at the least shall have intervened between the conviction of such person for the second and the conviction by(*w*) such person of the third offence; but each separate offence committed by any such person before the expiration of the said term of ten days shall be punishable by a separate penalty, as though the same were a second offence; and that the fourth or any subsequent offence which may be committed by any such person against this act shall be inquired of, tried, and punished in the manner hereinbefore provided in respect of any third offence; and that if the person or persons preferring any such information shall not be able or shall not see fit to produce evidence of any such previous conviction or convictions as aforesaid, any such offender as aforesaid shall be punished for each separate offence by him committed against the provisions of this act by an equal number of distinct and separate penalties, as though each of such offences were a first or second offence, as the case may be; and that no person shall be proceeded against or punished as for a second or as for a third offence at the distance of more than two years from the commission of the next preceding offence.

11. And be it further enacted, that it shall be lawful for any one justice of the peace, in all cases where any information or complaint shall be made as aforesaid, and he is hereby authorized and required, at the request in writing of any of the parties to the said complaint, and on the oath of the informer or complainant, or of the person informed or complained against, that he believes that the attendance of any person or persons as a witness or witnesses will be material to the hearing of such information, to issue his summons to any such person or persons, [*416] *witness or witnesses, to appear and give evidence on oath before himself and such other justice or justices as shall hear and determine such information or complaint, the time and place of hearing and determining the same being specified in the said summons; and if any person or persons so summoned shall not appear before the said last mentioned justices at the time or place so specified in the said summons, aud shall not offer any reasonable excuse for the default, to the satisfaction of the said last mentioned justices, or appearing according to the directions of the said summons shall not submit to be examined as witness or witnesses, then and in every such case it shall be lawful for such last mentioned justices,

(*w*) Sic.

and they are hereby authorised, (proof on oath, in the case of any person not appearing according to such summons, having been first made before such last mentioned justices of the due service of such summons on every such person, by delivering the same to him or to her, or by leaving the same at the usual places of abode of such person, twenty-four hours at the least before the time appointed for such person to appear before such last mentioned justices,) by warrant under the hands and seals of such last mentioned justices to commit such person or persons so making default in appearing, or appearing and refusing to give evidence, to some prison within the jurisdiction of the said justices, there to remain without bail or mainprize for any time not exceeding fourteen days, or until such person or persons shall submit to be examined and give evidence.

12. And be it further enacted, that all justices of the peace shall and are hereby empowered, on the conviction of any person or persons for any offence against this act, in default of payment of any penalty or forfeiture, together with the reasonable costs and charges attending such conviction, to cause the same to be levied by distress and sale of the goods and chattels of the offender or offenders, by warrant or warrants under the hands and seals of such justices, together with the reasonable costs of such distress and sale, and in case it shall appear to the satisfaction of such justices, either by the confession of the offender or offenders or by the oath of one or more credible witness or witnesses, that he, she or they hath not or have not goods and chattels within the jurisdiction of such justices sufficient whereon to levy all such penalties and forfeitures, costs and charges, such justices may, without issuing any warrant of distress, commit the offender or offenders to the common gaol for three calendar months (unless the same be sooner paid), in such manner as if a warrant of distress had been issued, and a return of nulla bona made thereon.

13. And be it further enacted, that no person shall be liable to be convicted of any offence against this act committed by his or her copartner in trade, and without his or her knowledge, privity, or consent; but it shall be lawful, when any penalty, or any sum for wages, or any other sum, is ordered to be paid, under the authority of this act, and the person or persons *ordered to pay the same shall neglect or refuse to do so, to levy the same by distress and sale of any goods belonging to any copartnership concern or business in the carrying on of which such charges may have become due, or such offence may have been committed; and in all proceedings under this act to recover any sum due for wages it shall be lawful in all cases of copartnership for the justices, at the hearing of any complaint for the nonpayment thereof, to make an order upon any one or more copartners for the payment of the sum appearing to be due; and in such case the service of a copy of any summons or other process, or of any order, upon one or more of such copartners, shall be deemed to be a sufficient service upon all. [*417]

14. And it is declared and enacted, that in all cases it shall be deemed and taken to be sufficient service of any summons to be issued against any offender or offenders, by any justice or justices of the peace, under the authority of this act, if a duplicate or true copy of the same be left at or upon the place used or occupied by such offender or offenders for car-

rying on his, her, or their trade or business, or at the place of residence of any such offender or offenders, being at or upon any such place as aforesaid, the same being directed to such offender or offenders by his, her, or their right or assumed name or names.

15. And be it further enacted, that the justices before whom any person shall be convicted of any offence against this act, or by whom any persan shall be committed to the common gaol, in default of a sufficient distress, or for not appearing as a witness, or not submitting to be examined, shall cause all such convictions, and the summonses for the attendance of witnesses, and the warrants or orders for such commitments, and the warrant or order of any such distress, to be drawn up in the form or to the effect set forth in the schedule to this act annexed, with such additions or variations as may be necessary for adapting the same to the particular circumstances of the case.

16. And be it further enacted, that the justices before whom any conviction shall be had under this act shall cause the same to be returned to the next general or quarter sessions of the peace holden for the county or place wherein the offence shall have been committed, and the same shall then and there be delivered to the clerk of the peace, or other person acting as such, to be by him filed among the records of the said Court; and such clerk of the peace, or other person acting as such, is hereby required, on the tender and payment to him of the sum of one shilling, to grant to any person or persons, on demand, a copy of any such conviction, with a certificate thereupon indorsed or thereunto annexed, that the same is a true and accurate copy of the original conviction returned to such general or quarter sessions as aforesaid.

17. And be it further enacted, that no conviction, order, or adjudication made by any justices of the peace under the provisions of this act [*418] shall be quashed for want of form, nor be *removed by certiorari or otherwise into any of his Majesty's superior Courts of record; and no warrant of distress, or of commitments in default of sufficient distress, shall be held void by reason of any defect therein, provided it be therein alleged that the party has been convicted, and there be a good and valid conviction to sustain the same.

18. And be it further enacted, that out of any penalty or forfeiture incurred by any offence committed against this act, it shall be lawful for the Court or justices imposing the same to award any sum to the informer, not exceeding in any case the sum of twenty pounds; and the rest of any such pecuniary penalty or forfeiture shall go to the treasurer of the county in which the offence shall be committed, in aid of the rates of such county: provided always, that every proceeding whatsoever for any offence against this act shall be commenced within three calendar months after such offence shall have been committed.

19. And be it further enacted, that nothing herein contained shall extend to any artificer, workman, or labourer, or other person engaged or employed in any manufacture, trade, or occupation, excepting only artificers, workmen, labourers, and other persons employed in the several manufactures, trades, and occupations following; (that is to say), in or about the making, casting, converting, or manufacturing of iron or steel,

or any parts, branches, or processes thereof; or in or about the working or getting of any mines of coal, ironstone, limestone, salt rock; or in or about the working or getting of stone, slate or clay;(*w*) or in the making or preparing of salt, bricks, tiles, or quarries; or in or about the making or manufacturing of any kinds of nails, chains, rivets, anvils, vices, spades, shovels, screws, keys, locks, bolts, hinges, or any other articles or hardwares made of iron or steel, or of iron and steel combined, or of any plated articles of cutlery, or of any goods or wares made of brass, tin, lead, pewter, or other metal, or of any japanned goods or wares whatsoever; or in or about the making, spinning, throwing, twisting, doubling, winding, weaving, combing, knitting, bleaching, dyeing, printing, or otherwise preparing of any kinds of woollen, worsted, yarn, stuff, jersey, linen, fustian, cloth, serge, cotton, leather, fur, hemp, flax, mohair, or silk manufactures whatsoever, or in or about any manufactures *whatsoever made of the said last mentioned materials, whether the same be or be not mixed one with another; or in or about the making or otherwise preparing, ornamenting, or finishing of any glass, procelain, china, or earthenware whatsoever, or any parts, branches, or process thereof, or any materials used in any of such last mentioned trades or employments; or in or about the making or preparing of bone, thread, silk, or cotton lace, or of lace made of any mixed materials. [*419]

20. And be it further enacted, that nothing herein contained shall extend to any domestic servant or servant in husbandry.

21. And be it further enacted, that no justice of the peace, being a person also engaged in any of the trades or occupations enumerated in this act, or the father, son, or brother of any such person, shall act as a justice of the peace under this act.

22. And be it futher enacted, that in all cities, boroughs, or corporate towns, where the magistrates for the time being are disqualified by the foregoing clause from administering this act, then and in every such case, and so often as the same shall happen, it shall be lawful for the magistrates of the county in which the offence may be committed (and not disqualified as aforesaid) to administer, and they are hereby authorized and empowered to hear, examine, and determine, any offences committed against this act, in any such cities, boroughs, or corporate towns; and it shall be lawful for the complainant to remove the cases of information or complaint for the said cities, boroughs, or corporate towns to any other Court of session or petty session not exceeding twelve miles from the place where the servant shall have been committed; any law, charter, usage, or custom to the contrary notwithstanding.

23. And be it further enacted and declared, that nothing herein contained shall extend or be construed to extend to prevent any employer of any artificer, or agent of any such employer, from supplying or contract-

(*w*) A contractor to execute a railway cutting at so much per cubic yard, who employs men under him to assist, is not a *workman* or *labourer* within the true meaning of this act, although he does a portion of the work himself. Where the earth removed is *clay*, which is used for making bricks; quære, whether a labourer engaged in the removal of such earth is a person "employed in or about the working or getting of clay," within sect. 19; Riley v. Warden, 2 Exc. 59. See also ante, p. 301, note; (*f*) and Weaver v. Floyd, 21 L. J., N. S., Q. B. 151.

ing to supply to any such artificer any medicine or medical attendance, or any fuel, or any materials, tools, or implements to be by such artificer employed in his trade or occupation, if such artificers be employed in mining, or any hay, corn, or other provender to be consumed by any horse or other beast of burden employed by any such artificer in his trade and occupation; nor from demising to any artificer, workman, or labourer employed in any of the trades or occupations enumerated in this act the whole or any part of any tenement at any rent(*x*) to be thereon reserved; nor from supplying or contracting to supply to any such artificer any victuals dressed or prepared under the roof of any such employer, and there to be consumed by such artificer; nor from making or contracting to make any stoppage or deduction from the wages of any such artificer, for or in respect of any such rent; *or for or in [*420] respect of any such medicine or medical attendance; or for or in respect of such fuel, materials, tools, implements, hay, corn, or provender, or of any such victuals dressed and prepared under the roof of any such employer; or for or in respect of any money advanced to such artificer for any such purpose as aforesaid; provided always, that such stoppage or deduction shall not exceed the real and true value of such fuel, materials, tools, implements, hay, corn, and provender, and shall not be in any case made from the wages of such artificer, unless the agreement or contract for such stoppage or deduction shall be in writing, and signed by such artificer.

24. And be it further enacted and declared, that nothing herein contained shall extend or be construed to extend to prevent any such employer from advancing to any such artificer any money to be by him contributed to any friendly society or bank for savings duly established according to law, nor from advancing to any such artificer any money for his relief in sickness, or for the education of any child or children of such artificer, nor from deducting or contracting to deduct any sum or sums of money from the wages of such artificers for the education of any such child or children of such artificer, and unless the agreement or contract for such deduction shall be in writing and signed by such artificer.

25. And be it further enacted and declared, that in the meaning and for the purposes of this act all workmen, labourers,(*y*) and other persons in any manner engaged in the performance of any work, employment or operation, of what nature soever, in or about the several trades and occupations aforesaid, shall be and be deemed "artificers;" and that within the meaning and for the purposes aforesaid all masters, bailiffs, foremen, managers, clerks, and other persons engaged in the hiring, employment, or superintendence of the labour of any such artificers, shall be and be deemed to be "employers;" and that within the meaning and for the purposes of this act any money or other thing had or contracted to be paid, delivered, or given as a recompense, reward, or remuneration for any labour done or to be done, whether within a certain time or to a cer-

(*x*) See Chawner v. Cummings, ante, p. 412, note.
(*y*) See Rieley v. Warden, ante, p. 418, note.

tain amount, or for a time or an amount uncertain, shall be deemed and taken to be the "wages" of such labour; and that within the meaning and for the purposes aforesaid any agreement, understanding, device, contrivance, collusion, or arrangement whatsoever on the subject of wages, whether written or oral, whether direct or indirect, to which the employer and artificer are parties or are assenting, or by which they are mutually bound to each other, or whereby either of them shall have endeavoured to impose an obligation on the other of them, shall be and be deemed a "contract."'

*26. And be it further enacted, that this act shall not commence or take effect till the expiration of three calendar months next after the day of passing the same. [*421]

27. And be it further enacted, that the provisions of this act shall extend over the whole of that part of the United Kingdom of Great Britain and Ireland called Great Britain.

SCHEDULE referred to in the forgoing Act..

Form of Conviction.

to wit. } BE it remembered, that on this day of in the year of our Lord at in the county of A. B. is duly convicted before us C. D. and J. G., two of his Majesty's justices of the peace for the of for that the said A. B. [*specify the offence, and the time and place when and where committed*], whereby the said A. B. has forfeited the sum of this being adjuged to be the first [*or* second] offence [*as the case may be*] against the provisions of an act to prohibit the payment of wages in goods, besides the costs of this conviction, which we assess at the sum of [*here state to whom and in what proportions the penalty and costs are to be paid,*] pursuant to the statute in that case provided.

Given under our hands and seals,

Summons to Witness.

to wit. } WHEREAS information upon oath hath been made before me, A. B. Esquire, one of his Majesty's justices of the peace for the county aforesaid, that C. D. of has been guilty of an offence against the laws prohibiting the payment of wages in goods, and that you are a material witness to be examined on the hearing and determination of such information: These are therefore to require you to appear personally before me, and such other justice or justices as shall hear and determine such information, at in the county aforesaid, on the day of at the hour of of the same day, there to be examined touching the matters alleged in such information. As witness my hand,

[*422] *Warrant of Commitment of a Witness.*

to wit. } To the constable or other proper officer and to the keeper or gaoler of .

Whereas C. D. hath been duly summoned to appear and give evidence before us, A. O. and G. F., two of his Majesty's justices of the peace for the county [*or* riding, city, division, *or* place] of on this day of being the time and place appointed for hearing and determining the complaint made on the oath of before us, against A. B., of having [*stating the offence as laid in the information*] contrary to the laws now in force for prohibiting the payment of wages in goods: And whereas the said C. D. hath not appeared before us at the time and place aforesaid specified for that purpose, or offered any reasonable excuse for his default [*or*]: and whereas the said C. D. having appeared before us at the time and place aforesaid specified for that purpose, hath not submitted to be examined as a witness and give his evidence before us touching the matter of the said complant, but hath refused so to do [*or*]; Therefore we the said justices do hereby, in pursuance of the statute made, *&c.* [*setting forth the title of this act*] commit the said C. D. to the [*describing the prison*] there to remain without bail or main-prize, for his contempt aforesaid, for the space of three calendar months, or until he shall submit himself to be examined and give his evidence touching the matter of the said complaint, or shall otherwise be discharged by due course of law. And you [*the constable or peace officer to whom the warrant is directed*] are hereby authorized and required to take into your custody the body of the said C. D., and him safely to convey to the said prison, and him there to deliver to the gaoler or keeper thereof, who is hereby authorized and required to receive into his custody the body of the said C. D., and him safely to retain and keep, pursuant to this commitment. Given under our hands and seals, this day of in the year of our Lord .

Warrant to distrain for Forfeiture.

to wit. } To the constable [headborough] *or* [tithingman] of

Whereas A. B. of is this day convicted before us, C. D. and J. G., two of his Majesty's justices of the peace in and for the said county, upon oath of H. K., a credible witness, for that the said A. B. did [*here set forth the offence*], contrary to the statute in that case made and provided, by reason whereof the said A. B. hath forfeited the sum of to be distributed as herein is mentioned, besides the sum of for costs, both of which he hath refused to pay; These are therefore, *in his Majesty's name, to command you to levy the [*423] said sum of and also the sum of for costs, by

distress of the goods and chattels of him the said A. B.; and if within the space of days next after such distress by you taken, the said sums, together with the reasonable charges of taking and keeping the same, shall not be paid, that then you do sell the said goods and chattels, so by you distrained, and out of the money arising by such sale that you do retain the said costs, and also the said forfeiture or sum of and thereout pay to L. M., who hath informed and prosecuted in this case, the sum of being his adjudged portion of such forfeiture, the residue whereof is to go to the treasurer of the said county of in aid of the rates thereof; and that you do return the overplus, on demand, to him the said A. B. (the reasonable charges of taking, keeping, and selling the said distress being first deducted;) and if sufficient distress cannot be found of the goods and chattels of the said A. B. whereupon to levy the said sum of that then you certify the same to us, together with this warrant.

Given under our hands and seals,

Commitment for Want of Distress.

} To the [constable] of in the said county, and to
to wit. } the keeper of the common gaol [*or* the house of correction] at in the said county.

Whereas A. B. of in the said county was on the day of convicted before us, C. D. and J. G., two of his majesty's justices of the peace in and for the said county, upon the oath of H. K., a credible witness, for that he the said A. B., [*here set forth the offence,*] contrary to the statute made in the year of the reign of his majesty king William the Fourth, by reason whereof the said A. B. hath forfeited the sum of besides the sum of for costs: and whereas on the day of in the year aforesaid we did issue our warrant to the [constable] of to levy the said sum of and costs, by distress and sale of the goods and chattels of him the said A. B., and to distribute the same according to the directions of the said statute: And whereas it duly appears to us, upon the oath of the said [constable], that the said [constable] hath used his best endeavours to levy the said sum on the goods and chattels of the said A. B. as aforesaid, but that no sufficient distress can be had whereon to levy the same [*or* by confession of the said A. B., *or* by the oath of a credible witness, that the said A. B. hath not goods and chattels within our jurisdiction whereon to levy the said forfeiture and costs;] These are therefore to command you the said [constable] of aforesaid to apprehend the said A. B., and him safely to convey to the common gaol [*or* house *of correction] at in the said county, and there [*424] to deliver him to the keeper thereof, together with this precept, and we do also command you the said keeper to receive and keep in your custody the said A. B. for the space of three months, unless the said sum and costs shall be sooner paid; and for so doing this shall be your sufficient warrant. Given under our hands and seals,

3 & 4 Wm. 4, c. 103.

An Act to regulate the Labour of Children and young Persons in the Mills and Factories of the United Kingdom.(z) [29th August, 1833.

Whereas it is necessary that the hours of labour of children and young persons employed in mills and factories should be regulated, inasmuch as there are great numbers of children and young persons now employed in mills and factories, and their hours of labour are longer than is desirable, due regard being had to their health and means of education: be it therefore enacted by the king's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, that from and after the first day of January one thousand eight hundred and thirty-four no person under eighteen years of age shall be allowed to work in the night, (that is to say,) between the hours of half past eight o'clock in the evening and half past five o'clock in the morning, except as hereinafter provided, in or about any cotton, woollen, worsted, hemp, flex, tow, linen, or silk mill or factory, wherein steam or water or any other mechanical power is or shall be used to propel or work the machinery in such mill or factory, either in scutching, carding, roving, spinning, piecing, twisting, winding, throwing, doubling, netting, making thread, dressing or weaving of cotton, wool, worsted, hemp, flax, tow or silk, either separately or mixed, in any such mill or factory situate in any part of the United Kingdom of Great Britain and Ireland: provided always, that nothing in this act shall apply or extend to the working of any steam or other engine, water-wheel, or other power in or belonging to any mill or building or machinery when used in that of the process or [*425] work commonly called *fulling, roughing, or boiling of woollens, nor to any apprentices or other persons employed therein, nor to the labour of young persons above the age of thirteen years when employed in packing goods in any warehouse or place attached to any mill, and not used for any manufacturing process: provided also, that nothing in this act shall apply or extend to any mill or factory used solely for the manufacture of lace.

2. And be it further enacted, that no person under the age of eighteen years shall be employed in any such mill or factory in such description of work as aforesaid more than twelve hours in any one day, nor more than sixty-nine hours in any one week, except as hereinafter provided.(a)

3. Provided always, and be it further enacted, that if at any time in any such mill, manufactory or buildings situated upon any stream of water, time shall be lost in consequence of the want of a due supply or of

(z) See also 7 & 8 Vict. c. 15; 10 & 11 Vict. c. 29; 13 & 14 Vict. c. 54, post; and as to rope work, &c., see 9 & 10 Vict. c. 40, post, p. 463, note,

(a) See note (z) p. 424.

an excess of water, or by reason of its being impounded in higher reservoirs, then and in every such case and so often as the same shall happen it shall be lawful for the occupier of any such mill, manufactory or building to extend the time of labour in this act prescribed at the rate of three hours per week until such lost time shall have been made good, but no longer, such time to be worked between the hours of five of the clock in the morning and nine of the clock in the evening: provided also that no time shall be recoverable after it has been lost six calendar months.(*b*)

4. And be it further enacted, that when any extraordinary accident shall happen to the steam engine, water-wheel, weirs, or watercourses, main shafting, main gearing, or gas apparatus of any such mill, manufactory, or buildings, by which not less than three hours' labour at any one time shall be lost, then and in every such case such time may be worked up at the rate of one hour a day, in addition to the aforesaid and hereinafter restricted hours of labour, for the twelve following working days, but not after.(*b*)

5. And whereas during periods of drought and of floods the power of water-wheels on some streams is wholly interrupted, or so far diminished that the machinery or part or parts of the machinery dependant upon such power cannot be regularly worked at one and the same time, and in consequence thereof a certain portion of the time of such persons as are employed in the working of such machinery may be lost in each day during such period of drought or floods; be it therefore enacted, that it shall be lawful for the occupier of any mill, manufactory, or building, when time is so lost, then and in every such case and so often as the same shall happen, to extend the hours between *which persons under eighteen years of age are hereinbefore allowed to work, [*426] (*videlicet*, from five of the clock in the morning till nine in the evening,) as hereinbefore limited, to such period as may in such case be necessary to prevent the loss of time, and no longer: provided always, that no child or young person within the respective ages prescribed by this act shall be actually employed a greater number of hours within the twenty-four hours of any one day than this act declares to be lawful; and provided also, that no child under thirteen years of age shall be employed after the hour of nine of the clock in the evening nor before the hour of five in the morning.(*b*)

6. And be it further enacted, that there shall be allowed in the course of every day not less than one and a half hours for meals to every such person restricted as hereinbefore provided to the performance of twelve hours work daily.(*c*)

7. And be it enacted, that from and after the first day of January one thousand eight hundred and thirty-four it shall not be lawful for any person whatsoever to employ in any factory or mill as aforesaid, except

(*b*) As to recovering lost time, see also 7 & 8 Vict. c. 15, ss. 33, 34; 13 & 14 Vict. c. 54, s. 4, post.

(*b*) See note (*b*), p. 425.

(*c*) See 7 & 8 Vict. c. 15, s. 36; 13 & 14 Vict. c. 54, s. 3, post.

in mills for the manufacture of silk, any child who shall not have completed his or her ninth year of age.(*d*)

8. And be it further enacted, that from and after the expiration of six months after the passing of this act it shall not be lawful for any person whatsoever to employ, keep, or allow to remain in any factory or mill as aforesaid for a longer time than forty-eight hours in any one week, nor for a longer time than nine hours in any one day, except as herein provided, any child who shall not have completed his or her eleventh year of age, or after the expiration of eighteen months(*e*) from the passing of this act any child who shall not have completed his or her twelfth year of age, or after the expiration of thirty months(*e*) from the passing of this act any child who shall not have completed his or her thirteenth year of age: provided nevertheless, that in mills for the manufacture of silk, children under the of age of thirteen years shall be allowed to work ten hours in any one day.(*f*)

9. And be it further enacted, that all children and young persons whose hours of work are regulated and limited by this act shall be entitled to the following holydays; *videlicet*, on Christmas Day and Good Friday the entire day, and not fewer *than eight half days besides [*427] in every year, such half days to be at such period or periods, together or separately, as may be most desirable and convenient, and as shall be determined on by the master of such children and young persons: provided nevertheless, that in Scotland any other days may be substituted for Christmas Day and Good Friday, both or either, as such master may determine.(*g*)

10. And be it further enacted, that if any child within the age hereinbefore restricted to nine hours of day labour shall have been employed in any one day for less than nine hours in one factory or mill, it shall be lawful for any person to employ such child in any other factory or mill on the same day for the residue of such nine hours; provided that such employment in such other mill or factory shall not increase the labour of such child to more than nine hours in any one day, or to more than forty-eight hours in any one week.

11. And be it further enacted, that from and after the expiration of six months after the passing of this act it shall not be lawful for any person to employ, keep, or allow to remain in any factory or mill any child who shall not have completed his or her eleventh year of age without such certificate as is hereinafter mentioned, certifying such child to be of the ordinary strength and appearance of a child of the age of nine years, nor from or after the expiration of eighteen months after the passing of this act any child who shall not have completed his or her twelfth year of age, without a certificate of the same form, nor from and after the expiration of thirty months after the passing of this act any child who shall not have completed his or her thirteenth year of age, without a certificate of the

(*d*) See 7 & 8 Vict. c. 15, s. 29, post. (*e*) "Calendar" months, 4 & 5 Wm. 4, c. 1.

(*f*) By 4 & 5 Wm. 4, c. 1, it is enacted, that in mills for the manufacture of silk, children under the age of thirteen years shall be allowed to work ten hours *every working day* in the week. See also 7 & 8 Vict. c. 15, s. 30 post.

(*g*) See further 7 & 8 Vict. c. 15, s. 37 post.

same form, which certificate shall be taken to be sufficient evidence of the ages respectively certified therein.(*h*)

12. And be it further enacted, that for the purpose of obtaining the certificate hereinbefore required in the case of children under the age of eleven, twelve, or thirteen years respectively, the child shall personally appear before some surgeon or physician of the place or neighborhood of its residence, and submit itself to his examination: and unless the surgeon or physician before whom the child has so appeared shall certify his having had a personal examination or inspection of such child, and also that such child is of the ordinary strength and appearance of children of or exceeding the age of nine years, and unless also such certificate shall within three months of its date be countersigned by some inspector or justice, or in that part of the United Kingdom called Scotland by some inspector or justice or burgh magistrate, such child shall not be employed in any factory or mill.(*h*)

*13 And be it further enacted, that the certificate hereinbefore required in the case of children under the age of eleven, twelve, or thirteen years respectively shall be in the form following:(*i*) [*428]
'I [*name and place of residence*], surgeon [*or* physician], do hereby 'certify, that A. B. the son [*or* daughter] of [*name and residence of 'parents, or if no parents, then the residence of the child*] has appeared 'before me, and submitted to my examination; and that the said [*name*] 'is of the ordinary strength and appearance [*according to the fact*] of a 'child of at least nine years of age [*or if apparently above nine, say* 'exceeding.'

14. And be it further enacted, that from and after the commencement of the several periods hereinbefore appointed for restricting the employment of children under the age of eleven, twelve, and thirteen years respectively, it shall not be lawful to employ, keep, or allow to remain in any factory or mill any person between the said ages respectively and the age of eighteen for more than nine hours in any day, nor between the hours of nine o'clock in the evening and five o'clock in the morning, without first requiring and receiving from such person a certificate in proof that such person is above the age of eleven, twelve, and thirteen respectively, which certificate, if a new certificate shall be required, shall be in such form as may be ordered by any inspector.

15. Provided nevertheless, and be it enacted, that the penalties and punishment hereinafter provided against any person not requiring or not receiving such certificate shall not be levied, if upon the complaint or proceeding for the enforcement of such penalties it shall appear to the satisfaction of the inspector or justice, or in that part of the United Kingdom called Scotland to the satisfaction of the inspector or justice or burgh magistrate by or before whom such proceeding shall be had, that the person so employed more than nine hours in the day, or between the hours of nine o'clock in the evening and half-past five o'clock in the morning, without such certificate, was at the time of the alleged offence above the age of eleven, twelve, or thirteen respectively.

(*h*) See further as to these certificates, 7 & 8 Vict. c. 15, ss. 8 to 17, inclusive, post.
(*i*) See note (*h*), p. 426.

16. And be it further enacted, that in case any inspector or justice or burgh magistrate shall refuse to countersign any such certificate, he shall state in writing his reasons for such refusal, and the parents of such child may thereupon take the certificate to the justices of the peace at petty sessions for the place or district of the child's residence, who are hereby empowered and required to decide upon the validity of such refusal; and every such act of any such petty sessions shall be free of all charge, cost, or expense whatsoever.

[*429] 17. And whereas by an act, intituled "An Act for the *Preservation of the Health and Morals of Apprentices and others employed in Cotton and other Mills and Cotton and other Factories," passed in the forty-second year of the reign of his late Majesty George the Third,(*i*) it was amongst other things provided, that the justices of the peace for every county or place in which such mill was situated should appoint yearly two persons not interested in or in any way connected with such mills or factories in such county to be visitors of such mills or factories, which visitors so appointed were empowered and required by the aforesaid act to enter such factories at any time they might think fit, and examine and report in writing whether the same were conducted according to the laws of the realm, and also to direct the adoption of such sanitory regulations as they might, on advice, think proper: And whereas it appears that the provisions of the said act with relation to the appointment of inspectors were not duly carried into execution, and that the laws for the regulation of the labour of children in factories have been evaded, partly in consequence of the want of the appointment of proper visitors or officers whose special duty it was to enforce their execution; be it therefore enacted, that upon the passing of this act it shall be lawful for his Majesty by warrant under his sign manual to appoint during his Majesty's pleasure four persons to be inspectors of factories and places where the labour of children and young persons under eighteen years of age is employed, and in the case of the death or dismissal of any of them to appoint another in the place of such deceased inspector, which said several inspectors shall carry into effect the powers, authorities, and provisions of the present act; and such inspectors or any of them are hereby empowered to enter any factory or mill, and any school attached or belonging thereto, at all times and seasons, by day or by night, when such mills or factories are at work, and having so entered to examine therein the children, and to make inquiry respecting their condition, employment, and education; and such inspectors or any of them are hereby empowered to take or call to their aid in such examination and inquiry such persons as they may choose, and summon and require any person upon the spot or elsewhere to give evidence upon such examination and inquiry, and to administer to such person an oath.

18. And be it further enacted, that the said inspectors or any of them shall have power and are hereby required to make all such rules, regulations, and orders as may be necessary for the due execution of this act,

(*i*) Ante, p. 400; and see further as to inspectors and their duties, &c., 7 & 8 Vict. c. 15, ss. 2 to 8 inclusive, post.

which rules, regulations, and orders *shall be binding on all persons subject to the provisions of this act; and such inspectors are [*430] also hereby authorized and required to enforce the attendance at school of children employed in factories according to the provision of this act, and to order tickets or such other means as they may think fit for vouchers of attendance at such schools; and such inspectors are also hereby required to regulate the custody of such tickets or vouchers, and such inspectors may require a register of them to be kept in every school and factory; and such inspectors are also hereby authorized and required to order a register of the children employed in any factory, and of their sex and hours of attendance, and of their absence on account of sickness, to be kept in such factory; and all registers, books, entries, accounts, and papers kept in pursuance of this act shall at all times be open to such inspectors and such inspectors may take or cause to be taken for their own use such copy as they may think proper; and such inspectors shall also make such regulations as may be proper to continue in force any certificates, tickets, or vouchers required by this act, and such certificates, tickets, or vouchers so continued in force shall have the same operation and effect as new certificates, tickets, or vouchers; and such inspector shall order and is hereby authorized to order the occupier of any factory or mill to register or cause to be registered any information with relation to the performance of any labour in such mill or factory, if such inspector deem such information necessary to facilitate the due inforcement of any of the provisions of this act or of any of the regulations which he may make under the authority of this act; and such inspector is hereby authorized to order such occupier of any mill or factory to transmit, in such manner as may be directed in such order, any information with relation to the persons employed or the labour performed in such mill or factory that such inspector may deem requisite to facilitate the performance of his duties, or any inquiry made under the authority of this act.

19. And be it further enacted, that it shall be lawful for one of his Majesty's principal Secretaries of State, if he shall see fit, upon the application of any inspector, to appoint any one or more persons to superintend, under the direction of any inspector, the execution of the provisions of this act, and of all rules, regulations, and orders made under the authority thereof; and such person shall be paid by such salary as may be determined by one of his Majesty's principal Secretaries of State; and such person so appointed shall have authority to enter any school-room, counting-house, or any part of any factory or mill, excepting such part or parts as may be used for manufacturing processes; and if any constable or peace officer shall be required by any inspector to perform any continuous service, it shall be lawful for such inspector to allow a special recompence to such constable or peace officer for such service: provided, nevertheless, *that any such orders may be altered or disallowed by one of his [*431] Majesty's principal Secretaries of State, on complaint made to him by memorial from any party interested.

20. And be it further enacted, that from and after the expiration of six months from the passing of this act every child hereinbefore restricted to

the performance of forty-eight hours of labour in any one week shall, so long as such child shall be within the said restricted age, attend some school to be chosen by the parents or guardians of such child, or such school as may be appointed by any inspector in case the parents or guardians of such child shall omit to appoint any school, or in case such child shall be without parents or guardians; and it shall and may be lawful, in such last mentioned case, for any inspector to order the employer of any such child to make a deduction from the weekly wages of such child as the same shall become due, not exceeding the rate of one penny in every shilling, to pay for the schooling of such child; and such employer is hereby required to pay the sum so deducted according to the order and direction of such inspector.(*k*)

21. And be it further enacted, that after the expiration of six months from the passing of this act it shall not be lawful to employ or continue to employ in any factory or mill any child restricted by this act to the performance of forty-eight hours of labour in any one week, unless such child shall, on Monday in every week next after the commencement of such employment, and during every succeeding Monday or other day appointed for that purpose by an inspector, give to the factory master or proprietor, or to his agent, a schoolmaster's ticket or voucher, certifying that such child has for two hours at least for six out of seven days of the week next preceding attended his school, excepting in cases of sickness, to be certified in such manner as such inspector may appoint, and in case of any holiday, and in case of absence from any other cause allowed by such inspector, or by any justice of the peace in the absence of the inspector; and the said last mentioned ticket shall be in such form as may be settled by any inspector.(*l*)

22. And be it further enacted, that wherever it shall appear to any inspector that a new or additional school is necessary or desirable to enable the children employed in any factory to obtain the education required by this act, such inspector is hereby authorized to establish or procure the establishment of such school.

23. And be it further enacted, that if upon any examination or inquiry any inspector shall be of opinion that any schoolmaster or schoolmistress is incompetent or in any way unfit for the performance of the duties of that office, it shall and may be *lawful for such inspector to disallow and withhold the order for any payment or any salary to such schoolmaster or schoolmistress as hereinbefore provided. [*432]

24. And be it further enacted, that if any child within the several ages hereinbefore restricted to the performance of nine hours of day labour shall be kept or allowed to remain in any room or place whatsoever where any machinery, is used, or shall be kept or allowed to remain on any premises within the outer walls of any factory or mill, for any longer time than nine hours during, any one day, or for any longer time than the residue of such nine hours in the case of any child which has been previously employed for any shorter time during the same day in any other

(*k*) See further 7 & 8 Vict. c. 15, ss. 38, 57, post.
(*l*) See further 7 & 8 Vict. c, 15, s. 39.

factory or mill, the occupier of such factory or mill shall, without any evidence of the employment of such child, be liable to the same penalty and punishment as for employing such child for such longer period; provided neverthless, that no place, yard, or play-ground open to the public view shall be considered part of the premises on which children shall not be allowed to remain beyond the hours hereinbefore stated: And be it further provided, that the children may be allowed to remain in any school-room attached to such factory or mill, or in any other waiting-room or parts of the premises where no machinery is used, and which shall at all times be open to the inspection of any mill warden or peace officer duly appointed under the provisions of this act.

25. And be it further enacted, that notice of any general order or regulation applying to more than one mill or factory, made by any inspector, if published for two successive weeks in one or more newspapers published in the town, place, or county where any such mill or factory is situate, shall in all cases, at the end of seven days after the second publication thereof, have the same effect in attaching a responsibility upon any offender against such order or regulation as a notice personally served upon such offender: provided nevertheless, that such notice shall not be to the exclusion of any other special notice which any inspector may deem expedient or proper.

26. And be it further enacted, that the interior walls, except such parts as are painted, of every mill or factory or building where the process of manufacturing is carried on, shall be limewashed, and the ceilings which have rooms or lofts above them, and all ceilings which are plastered, shall be whitewashed once every year, unless permission to the contrary, in writing, be granted by any inspector.(*m*)

27. And be it further enacted, that a copy or copies of such abstract of this act, and also such copy or copies of any regulation or regulations made in pursuance of this act, as any inspector *shall direct, shall be hung up and affixed in a conspicuous part or in several departments of every mill or factory; and such copy or copies of such abstract and of such rules or regulations, so hung up and affixed, shall be signed by the master or manager or overseer of such mill or factory; and such copy or copies shall be renewed by such master, manager, or overseer so often as any inspector may direct.(*n*) [*433]

28. And be it further enacted, that if any person shall give, sign, countersign, endorse, or in any manner give currency to any false certificate, knowing the same to be untrue, or if any person shall forge any certificate, or shall forge any signature or endorsement on any certificate, or shall knowingly and wilfully give false testimony upon any point material to any certificate of any inspector or schoolmaster, such person shall be deemed guilty of a misdemeanor, and shall, on conviction thereof before any inspector or justice, be liable to be imprisoned for any period not exceeding two months in the house of correction in the county, town, or place where such offence was committed.

29. And be it further enacted, that in case of the employment of any

(*m*) See also 42 Geo. 3, c. 73, s. 2, ante, p. 401; 7 & 8 Vict. c, 15, ss. 18, 58, post.
(*n*) See also 42 Geo. 3, c. 73, s. 12, ante, p. 404; 7 & 8 Vict. c. 15, s. 28, post.

child contrary to the provisions of this act, or for a longer time than is hereinbefore limited and allowed, or without a due compliance with the provisions of this act touching the education of children, or the certificates of surgeons or magistrates, the parent or parents of such child, or any person having any benefit from the wages of such child, shall be liable to a penalty(*o*) of twenty shillings, unless it shall appear to the satisfaction of the justice or inspector that such unlawful employment has been without the wilful default of such parent or person so benefited as aforesaid.

30. And be it further enacted, that if any offence shall be committed against this act, for which the master of any factory or mill is legally responsible, and it shall appear to the satisfaction of any justice or inspector that the same has been committed without the personal consent, concurrence, or knowledge of such master, by or under the authority of some agent or servant or workman of such master, it shall be lawful for such inspector or justice to summon such agent or servant or workman before him to answer for such offence, and such agent or servant or workman shall be liable to the penalties and punishment for such offence herein provided, and such inspector or justice shall convict such agent or servant or workman in lieu of such master.

31. And be it further enacted, that if any employer of children in any factory or mill shall, by himself or by his servants or workmen, offend against any of the provisions of this act, or *any order or regulation of any inspector made in pursuance hereof, such offender shall [*434] for such offence (except in the case of any offence for which some other penalty or punishment is specially provided) forfeit and pay any sum not exceeding twenty pounds, nor less than one pound, at the discretion of the inspector or justice before whom such offender shall be convicted: provided nevertheless, that if it shall appear to such inspector or justice that such offence was not wilful nor grossly negligent, such inspector or justice may mitigate such penalty below the said sum of one pound, or discharge the person charged with such offence.(*p*)

32. And be it further enacted, that if any person shall knowingly and wilfully obstruct any inspector in the execution of any of the powers entrusted to him by this act, such person shall for every such offence forfeit and pay a sum not exceeding ten pounds.(*q*)

33. And be it further enacted, that such inspector shall have the same powers, authority and jurisdiction over constables and peace officers, as regards the execution of the provisions of this act, as may by law be exercised by his Majesty's justices of the peace over such constables and peace officers.

34. And be it further enacted, that all proceedings for the enforcement of any penalty or punishment imposed by or under the authority of this act may be had before any inspector or justice of the peace acting in or for the town, place, county, or division where the offence shall be committed; and the inspector or justice before whom any person shall be sum-

(*o*) See 7 & 8 Vict. c. 15, s. 40, post.
(*p*) See 7 & 8 Vict. c. 15, s. 40, and ss. 56 to 65 inclusive, post.
(*q*) See 7 & 8 Vict. c. 15, ss. 40, 61, post.

marily convicted and adjudged to pay any sum of money for any offence against this act may adjudge that such person shall pay the same either immediately or within such period as the said inspector or justice shall think fit; and in case such sum of money shall not be paid immediately or at the time so appointed, the same shall be levied by distress and sale of the goods and chattels of the offender, together with the reasonable charges of such distress; and for want of sufficient distress such offender shall be imprisoned in the common gaol for any term not exceeding one calendar month where the sum to be paid shall not exceed five pounds, or for any term not exceeding two calendar months in any one case, the imprisonment to cease in each of the cases aforesaid upon payment of the sum due.

35. And be it further enacted, that all complaints for offences against this act shall be preferred at or before the time of the visit, duly notified, of any inspector next after the commission of such offence; and written notice of the intention to prefer the complaint for such offence shall by the complainant be given *within fourteen days after the commission of such offence to the party or parties complained against: provided always, that no more than one penalty for a repetition of the same offence shall be recoverable except after the service of the written notice as aforesaid.(r) [*435]

36. And be it further enacted, that it shall not be deemed necessary in any summons or warrant issued in pursuance of this act to set forth the name or other designation of each and every the partners in any such mill or factory, but that it shall be lawful to insert in such summons or warrant the name of the ostensible occupier or title of the firm by which the occupier or occupiers employing the workpeople of every such mill or factory are usually designated and known.

37. And be it further enacted, that the service of such summons or warrant on any occupier, principal manager, conductor, or agent of any such mill or factory shall be good and lawful service.

38. And be it further enacted, that it shall be lawful for the inspectors or any of them, or for any justice of the peace, upon any complaint, or upon any investigation under this act, without any complaint, to administer an oath to any witness, and to summon any witness forthwith to appear and give evidence before him or them, or at a time and place appointed for hearing such complaint or making such investigation, or to order such witness to be brought before him by any constable or peace officer; and if such witness shall not appear according to such summons, proof upon oath having been given of the due service of such summons, or shall resist such constable or peace officer, or shall not submit to be examined as a witness, it shall be lawful for such inspectors and justices by warrant under their hand and seal to commit such person for such non-appearance, resistance, or non-submission to the county prison, or prison of the place where such offence was committed, there to remain without bail or mainprize for any time not exceeding two calendar months.

(r) See 7 & 8 Vict. c. 15, s. 40, post.

39. Provided nevertheless, and be it enacted, that, except in the case of resistance to the constable or peace officer, it shall be lawful for the inspector or justice by whom such person shall have been committed to dicharge such person from prison, if such person shall show any cause to such inspector or justice which shall be deemed satisfactory as an excuse for such non-appearance, or if such person shall afterwards submit himself to be examined to the satisfaction of such inspector or justice, and the order of such inspector or justice for such discharge shall be a sufficient warrant to any gaol or prison keeper.

40. And be it further enacted, that every conviction under this act [*436] before any inspector or justice may be made according *to the form in the schedule to this act annexed; which conviction shall be certified to the next general quarter sessions, there to be filed amongst the records of the county, riding, or division, and shall have the force of an act of record, whether the same shall be by an inspector or by a justice of the peace for such county, riding, or division; and no conviction or other proceeding of any inspector or justice under this act shall be deemed illegal for any mere informality.

41. And be it further enacted, that if any person who shall have been sentenced or adjudged to pay any penalty or forfeiture under this act shall neglect or refuse to pay the same, it shall be lawful for the inspector or magistrates before whom such person shall have been convicted to issue his warrant to distrain the goods and chattels of such person; and if no sufficient distress shall be found, it shall be lawful for the said inspector or magistrates, upon such fact being certified by the constable having the execution of such distress warrant, to commit such person to the house of correction or common gaol of the town, county, or place where such offence was committed for any time not exceeding two months; and the said warrant of distress, commitment, and certificate of the constable may be in the forms contained in the Schedule to this act annexed.

42. And be it further enacted, that no appeal against any conviction under this act shall be allowed, except in the case of a conviction for the forgery of any certificates, vouchers, or other documents required by this act, or by any inspector under the authority of this act, neither shall any conviction, except in the case herein last excepted, be removable by certiorari or bill of advocation into any Court whatever.(s)

43. And be it further enacted, that any justice or inspector by whom any complaint under this act is determined shall, if he so thinks fit, give to the complainant or prosecutor one-half of any penalty imposed for any offence against any of the provisions of this act, together with all costs of prosecution and conviction, and the remainder of the penalty, or the whole if he shall think fit, shall be applied as such justice or inspector may direct for the benefit of any school wherein children employed in mills or factories are educated in such township or place where such offence shall be committed: provided always, that only one penalty shall be recoverable for any one description of offence from any one person

(s) See 7 & 8 Vict. c. 15, ss. 40, 69, 70, post.

for any one day; and that it shall not be deemed necessary for the complainant or prosecutor to name in any summons the particular township in which such offence shall have been committed, but it shall be lawful to set forth in such summons the name of the parish where such offence may have been committed: provided always, that such summons shall be issued upon complaint being made upon oath.(*t*)

*44. And be it further enacted, that every inspector shall be and is hereby authorized to order any constable or peace officer [*437] to provide for such inspector a convenient place for holding any sitting; and the expenses of providing such place shall be defrayed in the manner and proportions and by the person or persons herein appointed for the payment of any special remuneration to any constable or peace officer.

45. And be it further enacted, that every inspector shall keep full minutes of all his visits and proceedings, and shall report the same to one of his Majesty's principal Secretaries of State twice in every year, and oftener if required, and shall also report the state and condition of the factories or mills and of the children employed therein, and whether such factories or mills are or are not conducted according to the directions of this act and of the laws of the realm: and whereas it is expedient that the proceedings, rules, orders, and regulations of the several inspectors appointed under this act should be as nearly alike as is practicable under all circumstances, therefore such inspectors are hereby required, within three months next after they shall have commenced the execution of their several duties and powers under this act, and twice at least in every year afterwards, to meet and confer together respecting their several proceedings, rules orders, regulations, duties and powers, under this act, and at such meeting to make their proceeding, rules, orders, and regulations as uniform as is expedient and practicable; and such inspectors are hereby required to make and keep full minutes of such meetings, and to report the same to such Secretary of State when they make the report hereinbefore required.

46. And be it further enacted, and it is hereby declared, that in all cases in which any justices or justice of the peace are or is required to act or do any thing in any manner under this act, or are or is named therein, and whenever the subject-matter of any one of the enactments or provisions of this act shall arise within that part of the United Kingdom called Scotland, the burgh magistrates shall be held to have and shall have within the limits of their own jurisdiction the same powers, duties, and authorities, and which they are hereby required to exercise, as are by this act conferred upon said justices of the peace, and are required to be exercised by them.

47. Provided always, and be it enacted, that nothing in this act contained shall apply to Mechanics, artizans, or labourers under the prescribed ages working only in repairing the machinery or premises.(*u*)

48. And be it further enacted, that from and after the first day of

(*t*) See 7 & Vict. c. 15, ss. 40, 66, post.
(*u*) See also 7 & 8 Vict. c. 15, s. 73.

January, one thousand eight hundred and thirty-four the act passed in the first and second years of the reign of his present *Majesty, [*438] intituled "An Act to amend the Laws relating to Apprentices and other Persons employed in Cotton Mills, and to make further Provisions in lieu thereof," shall be repealed, and the same is hereby repealed, except as to any act or acts repealed by the same.

49. And be it further enacted, that any words in this act denoting the masculine gender shall be construed to extend to persons of either sex, and any words denoting the singular number shall be construed to extend to any number of persons or things, if the subject-matter or context shall admit of such an interpretation, unless such construction shall be in express opposition to any other enactment.

50. And be it further enacted, that this act shall be deemed and taken to be a public act, and shall be judicially taken notice of as such by all judges, justices, and others.

The SCHEDULE to which this Act refers.

Form of Conviction.

County of [town of *as the fact may be*] to wit. } BE it remembered, that on the day of in the year A. B. [*describe the offender*] was, upon complaint of C. D. [*or* upon the view of C. D. one of his Majesty's inspectors of factories], convicted before E. F., one of his Majesty's inspectors of factories *or* justice of the peace, of and for, *&c.* [*as the case may be,*] in pursuance of an act passed in the fourth year of the reign of his Majesty King William the Fourth, for [*describe the offence.*] Given under my hand and seal the day and year above mentioned.

Warrant to distrain for Forfeiture.

To the constable, *&c.*

County of to wit. } WHEREAS A. B. of in the said county is this day convicted before me C. D., one of his Majesty's inspectors of factories, [*or* justices of the peace in and for the said county,] upon the oath of a credible witness, [*or* upon my own view *as the case may be*] for that he the said A. B. hath [*here set forth the offence, describing it particularly in the words of the statute or rule, as near as can be*], contrary to the statute [*or* rule, *if the offence is against some rule or regulation or order of an inspector*] in that case made and provided, by reason whereof the said A. B. is adjudged to have *forfeited the sum of £ to be distributed as hereinafter [*439] mentioned: These are therefore in his Majesty's name to command

you to levy the said sum of £ by distress of the goods and chattels of him the said A. B.; and if within the space of four days next after such distress by you taken, the said sum of £ together with the reasonable charges of taking and keeping the same, shall not be paid, that then you do sell the said goods and chattels by you so distrained, and out of the money arising by such sale that you do pay [*according to the award of the justice,*] returning the overplus, on demand, to him the said A. B., the reasonable charges of taking, keeping, and selling the said distress being first deducted; and if sufficient distress cannot be found of the goods and chattels of the said A. B. whereon to levy the said sum of £ that then you certify the same to me, together with this warrant. Given under my hand and seal the day of .

C. D.

Return of Constable upon Warrant of Distress where no Effects.

I A. B., constable of in the county of do hereby certify and make oath, that by virtue of this warrant I have made diligent search for the goods of the within named and that I can find no sufficient goods whereon to levy the same. As witness my hand the day of

A. B.

Sworn before me the day and year .

C. D.

Commitment for Want of Distress.

County of } To the constable of in the county of
to wit. } and to the keeper of the common gaol [*or* house of correction] at in the said county.

Whereas A. B. of in the said county was, on the day of convicted before me C. D. Esquire, one of his Majesty's justices of the peace in and for the said county, [*or* inspector of factories, *as the fact may be*], upon the oath of a credible witness, [*or* upon my own view, *as the case may be*], for that he [*here set forth the offence*], contrary to the statute made in the year of the reign of his Majesty King William 4, for [*according to the title of the act,* or contrary to a certain rule or order or regulation of his Majesty's inspectors of factories], and the said A. B. by reason thereof hath been adjudged to forfeit and pay the sum of And whereas on the day of in the year aforesaid, I did issue my warrant to the constable of to levy the said sum of by distress and sale of the *goods and chattels of him the said A. B., and to distribute the same as in my said warrant was mentioned: And [*440] whereas it duly appears to me, upon the oath of the said constable, that he hath used his best endeavours to levy the said sum on the goods and chattels of the said A. B., but that no sufficient distress can be had whereupon to levy the same: These are therefore to command you the said constable of aforesaid to apprehend the said A. B., and him safely to

convey to the common gaol [*or* house of correction] at in the said county, and there deliver him to the keeper thereof, together with this precept; and I do also command you the said keeper to receive and keep in your custody, the said A. B. for the space of unless the said sum shall be sooner paid, pursuant to the said conviction and warrant; and for so doing this shall be your sufficient warrant. Given under my hand and seal the day of .

C. D.

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5 & 6 Vict. c. 99.

An Act to prohibit the Employment of Women and Girls in Mines and Collieries, to regulate the Employment of Boys, and to make other Provisions relating to Persons working therein. [10th August, 1842.]

Whereas it is unfit that women and girls should be employed in any mine or colliery, and it is expedient to make regulations regarding the employment of boys in mines and collieries, and to make provisions for the safety of persons working therein: be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, that from and after the passing of this act it shall not be lawful for any owner of any mine or colliery whatsoever to employ any female person within any mine or colliery, or permit any female person to work or be therein, for the purpose of working therein, other than such as were at or before the passing of this act employed within such mine or colliery; and that from and after three callendar months from the passing of this act it shall not be lawful for any owner of any mine or colliery to employ any female person who at the passing of this act shall be under the age of eighteen years within any mine or colliery, or permit such person to work or be therein as aforesaid; and any indentures of apprenticeship whereby any female person who at the passing of this act was under the age of eighteen years shall be bound to work or be liable to be called on to work in any mine or colliery shall, [*441] at *the expiration of three calendar months from the passing of this act, be absolutely void; and from and after the first day of March one thousand eight hundred and forty-three it shall not be lawful for any owner of any mine or colliery to employ any female person whatsoever within any mine or colliery, or to allow or permit any female person to work or be therein as aforesaid; and every indenture of apprenticeship, or other contract or engagement, whereby any female person whatsoever shall be bound to work or be liable to be called on to work within any mine or colliery (other than such as are before declared to be void at the end of three calendar months as aforesaid) shall, from and after the said first day of March one thousand eight hundred and forty-three, be absolutely void.

2. And be it enacted, that after the first day of March one thousand eight hundred and forty-three it ahall not be lawful for any owner of any mine or colliery to employ any male person under the age of ten years within any mine or colliery, or to permit any such male person to work, or be therein for the pupose of working therein, other than such as at the passing of this act shall have attained the age of nine years, and were at or before the passing of this act employed within such mine or colliery.

3. And be it enacted, that it shall be lawful for one of her Majesty's principal Secretaries of State, if and when he shall think fit, to appoint any proper person or persons to visit and inspect any mine or colliery; and it shall be lawful for every person so authorized to enter and examine such mine or colliery, and the works, buildings and machinery belonging thereto, at all times and seasons, by day or by night, and to make inquiry touching any matter within the provisions of this act; and the owner or occupiers of such mines and collieries, or their agents, are hereby required to furnish the means necessary for such person or persons so appointed to visit and inspect such mines and collieries, works, buildings, and machinery; and every person to be so appointed shall report his proceedings in the execution of this act in such manner as may be directed by the Secretary of State; and he shall in like manner report the state and condition of the persons working in such mine or colliery, and whether or not the provisions of this act are properly observed in the mine or colliery which he shall so inspect.

4. And be it enacted, that from and after the passing of this act no person or persons shall take any apprentice who shall be bound to work, or be liable to be called on to work, or be otherwise occupied, within a mine or colliery, who shall be under the age of ten years, or for a longer term of apprenticeship than eight years, except as the apprentice of a a mason, joiner, engine wright, or other mechanic whose services may be required occasionally below as well as above ground; and every indenture of apprenticeship whereby any person shall be hereafter bound contrary to the provisions of this act shall be void; *and when any person who is now serving under articles of apprenticeship within any [*442] mine or colliery shall attain the age of eighteen years, he shall be discharged from such apprenticeship, and the articles of aprenticeship shall become absolutely null and void.

5. And be it enacted, that every person or persons, body or company, offending against any of the aforesaid provisions, shall forfeit a sum not more than ten pounds nor less than five pounds, for every person employed or suffered to be in a mine or colliery contrary to the aforesaid provisions, to be sued for and recovered as after mentioned.

6. Provided always, and be it enacted, that if it shall appear on inquiry before any justices under the provisions of this act that any person under the age hereinbefore specified has been employed in any colliery on the representation of the parent or natural guardian of such person that he was above the age so hereinbefore specified, and if it shall appear to such justices that such person was so employed under the bona fide impression and belief on the part of the employer that he was not under the

age so specified, it shall be lawful for such justices, if they see fit, to remit the said penalty as against the party employing such person, and to summon the parent or natural guardian of the person employed to appear before them on a day to be named for the purpose, and on conviction of such parent or guardian of having wilfully misrepresented the age of the person employed, such parent or guardian shall forfeit a sum not exceeding forty shillings.

7. And be it enacted, that nothing hereinbefore contained shall prevent any person whatever from being employed in or about any mine or colliery, so as such employment shall be carried on above ground.

8. And be it enacted, that where there shall be any entrance to a mine or colliery by means of a vertical shaft or pit or inclined plane, or where there shall be any communication within any part of a mine or colliery to any other part thereof by a vertical shaft or pit or inclined plane, then it shall not be lawful for any owner of any such mine or colliery to allow any person or persons other than a male of the age of fifteen years and upwards to have charge of any steam engine or other engine, windlass, or gin, (whether driven or worked by manual labour or any other power whatsoever), or to have charge of any part of the machinery, ropes, chains, or other tackle of any such engine, by or by means of which engine, machinery, ropes, chains, or other tackle persons are brought up or passed down any such vertical shaft or pit or inclined plane; and any person or persons offending against the provision last aforesaid shall for every such offence forfeit a sum not exceeding fifty pounds nor less than twenty pounds, to be recovered as after provided.

9. Provided always, and be it enacted, that in the case of a windlass [*443] or gin worked by horse or other animal, the person *on the bank under whose direction the driver of the animal used for such windlass or gin shall act shall for the purposes of this act be deemed and taken to be the person having the charge thereof.

20. And whereas the practice of paying wages to workmen at public houses is found to be highly injurious to the best interests of the working classes: be it therefore enacted, that from and after the expiration of three months from the passing of this act no proprietor or worker of any mine or colliery, or other person, shall pay or cause to be paid any wages or money in respect of wages for work or labour or services done in or about any mine or colliery to any person employed in or about such mine or colliery, or to any person whatever entitled to or having authority or claiming to have authority to receive such wages, at or within any tavern, public house, beer shop, or other house of entertainment, or any office, garden, or place belonging thereto or occupied therewith, but all payments in respect of such wages are hereby strictly prohibited and forbidden to be made at or within such places as aforesaid, and all payments so made are hereby declared to be of no effect whatever.

11. And be it enacted, that notwithstanding any payment of wages or money in respect of wages which shall or may be made at any such prohibited place, the person or persons to whom such wages were due or payable, or but for such payment would be due or payable, shall and may

recover and receive the same in like manner as if no such payments had been made.(*a*)

12. And be it enacted, that in case any owner of any mine or colliery, or any person liable or intrusted or employed to pay any wages or money in respect of wages for such work, labour, or services aforesaid, shall, contrary to the provisions lastly hereinbefore contained, pay or cause to be paid any such wages or money to any person whatever, at any such prohibited place as aforesaid, the person or persons so offending shall for every such offence forfeit a sum not exceeding ten pounds nor less than five pounds, to be recovered as after provided.

13. And be it enacted, that if any offence shall be committed against this act for which the owner of any mine or colliery is hereby made responsible, and it shall be made to appear to the satisfaction of any justices or sheriff, that the offence has been committed by or under the authority of some agent, servant or workman of such owner, or by or under the authority of a contractor, without the personal consent, concurrence, or knowledge of such owner, it shall be lawful for such justices or sheriff to summon such agent, servant, workman, or contractor before them or him to answer for such offence; and such agent, servant, workman, or contractor, if convicted, shall be liable to the penalties and punishment for such offence herein specified; *and such justices or sheriff may convict such agent, servant, workman, or contractor in lieu of [*444] such owner.

44. And be it enacted, that the "owner" of a mine or colliery shall be taken to mean the immediate proprietor or lessee or occupier thereof, and all persons working any mine or colliery, or any part of any mine or colliery, or any lode or seam thereof, for their own benefit or as sharers of the profit, and also all partners and companies so working such mine or colliery, or any part thereof; and the words "agent" and "servant" shall be taken to mean any person receiving a salary, wages, payment, or remuneration for any description of service or work performed in a mine or colliery.

15. And be it enacted, that it shall not be necessary, in any information, summons, or warrant issued under or in consequence of the provisions of this act, to set forth the name or other designation of all the partners in any mine or colliery or in the working of any such mine or colliery, but that it shall be sufficient to insert in any such information, summons, or warrant the name of the ostensible proprietor, occupier, lessee, or adventurer, or title of the firm or company by which the owners, lessees, or workers of such mine or colliery are usually designated and known.

16. And be it enacted, that the service of any summons or warrant by delivering the same or a copy thereof at the office or counting-house of any mine or colliery shall be good and sufficient service thereof on the owner of such mine or colliery (and all complaints for offences against this act shall be preferred within three calendar months next after the commission of the offence.)

(*a*) See Weaver v. Floyd, 21 L. J., N. S., Q. B. 151.

17. And be it enacted, that all convictions for penalties for any offence against this act may be had before two or more justices of the peace acting for the county, riding, city, borough, division, or place where the offence shall happen, or before such justices or the sheriff of any county or stewartry in Scotland within which the offence may have been committed; and such penalties, and the costs and charges attending the recovery thereof, shall be levied by distress and sale of the goods and chattels of the offender or person liable or ordered to pay the same respectively, by warrant under the hands and seals of two or more of the said justices, or under the hand of any such sheriff, rendering the overplus of such distress and sale (if any) to the party or parties, after deducting the charge of making the same, which warrant such justices or sheriffs are hereby empowered and required to grant upon conviction of the offender, by confession or oath of one or more credible witness or witnesses; and the penalties, costs, and charges, when so levied, shall be paid, the one-half to the informer and the other half to the overseers or managers of the poor of the parish, township, or place where the offence shall have been committed, to be by such overseers or managers applied [*445] in aid of *the rate or assessment raised for the relief of the poor of such parish, township, or place, and in Scotland, in parishes where there shall be no assessment for the relief of the poor, as the said managers shall direct, or to her majesty, in case there shall be no such overseer or manager.

18. And be it enacted, that the justices of the peace or sheriffs by whom any person shall be convicted and adjudged to pay any sum of money for any offence against this act may adjudge that such person shall pay the same, together with costs, either immediately or within such period as the said justices or sheriffs shall think fit; and that in default of payment at the time appointed, and in the event of no sufficient distress of the goods and chattels of such person being found within the limits of the jurisdiction of the said justices or sheriffs, such person shall be imprisoned in the common gaol or house of correction, (with or without hard labour,) as to the said justices or sheriffs shall seem meet, for any time not exceeding two calendar months, the commitment to be determinable upon payment of the amount of the penalty and costs.

19. And be it enacted, that no inhabitant of any parish, township, or place, shall be deemed an incompetent witness in any suit, action, information, complaint, appeal, prosecution, or proceeding to be had, made, prosecuted, or carried on under the authority of this act for any offence committed within such parish, township, or place, by reason of such person being rated or assessed to, or liable to be rated or assessed to, or being otherwise interested in, the rates or assessments of any such parish, township or place.

20. And be it enacted, that where any distress shall be made for any sum or sums of money to be levied by virtue of this act, the distress itself shall not be deemed unlawful, nor the party or parties making the same be deemed a trespasser or trespassers, on account of any defect or want of form in any proceedings relating thereto, nor shall the party or parties distraining be deemed a trespasser or trespassers from the beginning on

account of any irregularity which shall be afterwards done by the party or parties distraining, but the person or persons aggrieved by such irregularity may recover full satisfaction for the special damage in an action on the case, to be brought in some of the courts of record at Westminster or Dublin, or by action raised or complaint preferred in the court of session in Scotland: provided always, that no plaintiff or plaintiffs shall recover in any action for any such irregularity, trespass, or wrongful proceeding, if tender of sufficient amends for any such special damage shall be made by or on behalf of the party or parties who shall have committed or caused to have been committed any such irregularity or wrongful proceeding before such action or complaint brought; and in case no such tender shall have been made it shall be lawful for the defendant or defendants in any such action, by leave of the court where *such action shall depend, at any time before issue joined, to pay into [*446] court such sum of money as he or they shall see fit; whereupon such proceedings or orders and judgments shall be had, made, and given in and by such court as in other actions where the defendant is allowed to pay money into court.

21. And be it enacted, that any person who shall think himself or herself aggrieved by any conviction by any justices of the peace under this act may appeal to the next court of general or quarter sessions of the peace which shall be holden not less than fifteen days after the day of such conviction for the county, stewartry, riding, city, borough, division, or place wherein the cause of complaint shall have arisen; provided that such person shall give to the complainant a notice in writing of such appeal, and of the cause and matter thereof, within seven days after such conviction, and seven clear days at the least before such session, and shall also either remain in custody until the session, or enter into a recognizance with two sufficient sureties before a justice of the peace, conditioned personally to appear at the said session of the peace, and to try such appeal, and to abide the judgment of the court thereupon, and to pay such costs as shall be by the court awarded; and upon such notice being given and such recognizance being entered into the justice before whom the same shall be entered into shall liberate such person, if in custody; and the court at such session shall hear and determine the matter of the appeal, and shall make such order therein, with or without costs to either party, as to the court shall seem meet, and in case of the dismissal of the appeal or affirmance of the conviction, shall order and adjudge the offender to be punished according to the conviction, and to pay such costs as shall be awarded, and shall, if necessary, issue process for enforcing such judgment; and all judgments, determinations, and proceedings of such justices not appealed from as aforesaid, and of such sheriff or quarter sessions, shall be final, and not subject to review by any process of law or court whatever, any law or usage to the contrary notwithstanding.

22. And be it enacted, that no conviction, or adjudication made on appeal therefrom, shall be quashed for want of form, or be removed, by certiorari, or otherwise, into any of her majesty's superior courts of record; and no warrant of commitment shall be held void by reason of any

defect therein, provided it be therein alleged that the party has been convicted, and there be a good and valid conviction to sustain the same.

23. And be it enacted, that this act may be amended or repealed by any act to be passed in this session of parliament.

[*447] *6 & 7 Vict. c. 40.

An Act to amend the Laws for the prevention of Frauds and Abuses by Persons employed in the Woollen, Worsted, Linen, Cotton, Flax, Mohair, and Silk Hosiery Manufactures, and for the further securing the Property of the Manufacturers and the Wages of the Workmen engaged therein. [1st August, 1843.]

Whereas an act was passed in the session of Parliament held in the eighth and ninth years of King William the Third, intituled "An Act for the further Encouragement of the Manufacture of Lustrings and Alamodes within this Realm, and for the better preventing the Importation of the same, whereby (amongst other matters therein contained) certain penalties, forfeitures and punishments, therein referred to, were imposed upon persons embezzling or otherwise unlawfully selling or receiving, as therein is mentioned, silk delivered by the silk manufacturers to be worked up: and whereas an act was passed in the first year of the reign of her late Majesty Queen Anne, entituled "An Act for the more effectual preventing the Abuses and Frauds of Persons employed in Working up the Woollen, Linen, Fustian, Cotton, and Iron Manufactures of this Kingdom;" And whereas the said act was made perpetual by an act passed in the ninth year of the reign of her said late Majesty Queen Anne, intituled "An Act for reviving and continuing an Act made in the First Year of Her Majesty's Reign for the more effectual preventing Abuses and Frauds of Persons employed in the Working up the Woollen, Linen, Fustian, Cotton, and Iron Manufactures of this Kingdom:" and whereas an act was passed in the twelfth year of the reign of his late Majesty King George the First, (intituled "An Act to prevent unlawful Combinations of Workmen employed in the Woollen Manufactures, and for better Payment of their Wages:') And whereas an act was passed in the thirteenth year of his late Majesty King George the Second, intituled "An Act to explain and amend an Act made in the First Year of the Reign of Her late Majesty Queen Anne, intituled An Act for the more effectual preventing the Abuses and Frauds of Persons employed in the Working up the Woollen, Linen, Fustian, Cotton, and Iron Manufactures of this Kingdom, and also for extending the said Act to the Manufacture of Leather:" and whereas an act was passed in the twenty-second year of the reign of his late Majesty King George the Second, intituled "An Act for the more effectual preventing of Frauds and Abuses committed by persons employed in the manufacture of Hats, and in the Woollen, Linen, Fustian, Cotton, Iron, Leather, Fur, Hemp, Flax, Mohair, and Silk Manufactures, and for preventing unlawful Com-

bination of Journeymen Dyers and Journeymen *Hotpressers, and of all Persons employed in the said several Manufactures, [*448] and for the better Payment of their Wages:" and whereas another act was passed in the seventeenth year of the reign of his late Majesty King George the Third, entituled "An Act for Amending and rendering more effectual the several Laws now in being for the more effectual preventing of Frauds and Abuses by Persons employed in the Manufacture of Hats, and in the Woollen, Linen, Fustian, Cotton, Iron, Leather, Fur, Hemp, Flax, Mohair, and Silk Manufactures; and also for making Provisions to prevent Frauds by Journeymen Dyers:" and whereas an act was passed in the thirty-second year of his late Majesty King George the Third, intituled "An Act for extending the Provisions of an Act made in the Thirteenth Year of the Reign of his present Majesty, intituled "An Act to empower the Magistrates therein mentioned to settle and regulate the Wages of Persons employed in the Silk Manufactures within their respective Jurisdictions, to Manufactures of Silk mixed with other Materials, and for the more effectual Punishment of Buyers and Receivers of Silk Purloined and Embezzled by Persons employed in the Manufacture thereof:" and whereas the provisions of the said acts have not been effectual to prevent frauds, embezzlements, and abuses by persons employed in the woollen, linen, cotton, flax, mohair, and silk hosiery manufactures, and it is expedient to repeal so much of the said recited acts as relates to the said manufactures, and to make further provisions in lieu thereof, as well for the benefit and encouragement of trade and manufactures as for the security of the property of manufacturers and the wages of the workmen engaged in said manufactures: be it therefore enacted, by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, that from and after the commencement of this act, so much of the said recited acts or any of them as relates to the woollen, linen, cotton, flax, mohair, and silk manufactures, or any of them, or any manufactures whatsoever made of wool, cotton, flax, mohair, or silk materials, whether the same be or be not mixed with each other or with any other materials, shall, so far as respects the manufactures, trades, occupations and employments hereinafter mentioned, be and the same are hereby repealed save and except so far as the same may have repealed any former acts or enactments.

2. And be it enacted, that if any person whosoever entrusted with any woollen, worsted, linen, cotton, flax, mohair, or silk materials for the purpose of being prepared, worked up, or manufactured either by himself or by any person or persons to be employed by or under him, or by himself jointly with any person or persons to be employed with by or under him, or for any purpose or work connected with manufacture or incidental thereto, or any parts, branches, or processes thereof, or any tools, or *apparatus for manufacturing the said materials, shall sell, pawn, purloin, embezzle, secrete, exchange, or otherwise fraudulently [*449] dispose of the same materials, tools or apparatus, or any part thereof, he shall, upon being thereof lawfully convicted by the oath of the owner of such materials, tools or apparatus, or any part thereof, or of any other

credible witness or witnesses before two or more justices of the peace, forfeit the full value of the same, and also forfeit such penalty not exceeding ten pounds, together with costs as to the said justices shall seem meet, and every such forfeiture and penalty shall be applied under the direction of the convicting justices in manner following, (that is to say,) in the first place in making such satisfaction to the party injured as the said justices shall think proper, and the remainder, if any, shall be applied in the same manner as is hereinafter directed for the disposal of any other penalty under this act; and in default of payment of such forfeiture and penalty with costs immediately on conviction, or within such period as the justices so convicting may direct, the said justices may issue their warrant to distrain and sell the goods and chattels of the person so convicted for the amount thereof, and costs; and the proceeds of any distress after paying the penalty, forfeiture and costs, and also the costs of such distress, shall be paid over to the person convicted; but if no sufficient distress shall appear or shall be found whereon to levy the said penalty, forfeiture and costs, the said justices may either immediately, or at any time after such conviction, commit any person so convicted to the common gaol or house of correction, to be there imprisoned with or without hard labour, as to the said justices shall seem meet, for any term not exceeding three calendar months, unless the amount of such forfeiture and penalty with costs, or so much thereof as shall not have been paid previously to the commencement of such imprisonment, be sooner paid.

3. And be it enacted, that if any person whosoever entrusted with any woollen, worsted, linen, cotton, flax, mohair, or silk materials for the purpose of being prepared, worked up, or manufactured, either by himself or by any person or persons to be employed by or under him, or by himself jointly with any person or persons to be employed with, by, or under him, or for any purpose or work connected with manufacture or incidental thereto, or any parts, branches, or processes thereof, or with any tools or apparatus for manufacturing the said materials, shall neglect or delay to return the said materials, tools, or apparatus, or any part thereof, for the space of fourteen clear days after being required so to do by the party entrusting him therewith, or by some person on his behalf, by notice in writing to be served upon or left at the last or usual place of abode or business of such person (unless prevented by some reasonable and sufficient cause to be allowed by the justice before whom he shall be brought,) then and in every such case all or so much or so many of the said materials, tools, or apparatus as shall not be *returned to the person [*450] so entrusting him therewith within the time aforesaid shall be deemed to be embezzled by the person so neglecting or delaying to return the same; and the person so neglecting or delaying to return the same shall for every such offence be liable to be proceeded against for embezzlement in the same manner and subject to the same forfeiture and penalty with costs, and to be applied in the same manner, as are respectively hereinbefore prescribed and imposed in respect to persons selling, pawning, purloining, embezzling, secreting, exchanging, or otherwise fraudulently disposing of the said materials.

4. And be it enacted, that any person who shall purchase or take in pawn, or who in any other way shall receive into his premises or possession any woollen, worsted, linen, cotton, flax, mohair, or silk materials, and whether the same or any part of the said materials be or be not wholly or partially wrought, made up, or manufactured into merchantable wares, or any tools or apparatus for manufacturing the same, knowing that such materials, tools, or apparatus are purloined or embezzled or fraudulently disposed of, or that the person from whom he shall purchase, take in pawn, or receive the same is fraudulently or unlawfully disposing thereof, or knowing such person to be employed or entrusted by any other person or persons to work up, either by himself or by or with others, the materials so purchased, taken in pawn, or received for any other person or persons, and not having first obtained the consent of the person or persons so employing or entrusting him therewith, shall, on conviction by the oath of the owner or of any other credible witness or witnesses, be deemed and adjudged guilty of a misdemeanor, and be punished in manner hereinafter mentioned.

5. And be it enacted, that if any person shall sell, pawn, pledge, exchange, or otherwise unlawfully dispose of, or offer to sell, pawn, pledge, exchange, or otherwise dispose of any such materials, tools, or apparatus as aforesaid, knowing the same to have been so purloined or embezzled or received from persons fraudulently disposing thereof as aforesaid, he shall, on conviction by the oath of the owner of such materials, tools, or apparatus, or any part thereof, or of any other credible witness or witnesses, be deemed and adjudged guilty of a misdemeanor, and be punished in manner hereinafter mentioned.

6. And be it enacted, that on proof on oath that there is just cause to suspect that any such materials, tools, or apparatus as aforesaid have been fraudulently sold, pawned, pledged, purloined, or embezzled by the person to whom the same were entrusted, or that any such materials, tools, or apparatus have been purchased, or received, or sold, pawned, pledged, exchanged, or otherwise unlawfully disposed of or offered for sale, pawn, pledge, exchange, or other disposal by any person knowing the same to have been purloined, embezzled, or received from some person fraudulently disposing thereof, it shall and may be lawful for any one justice of the peace, and such justice is hereby *required to issue his warrant for apprehending any such person and bringing him before him or some other justice of the peace for examination; and if, upon such examination, the charge of having fraudulently sold, pawned, purloined, embezzled, or otherwise fraudulently disposed of any such materials, tools, or apparatus, or of having purchased, or received, or sold, pawned, pledged, exchanged, or otherwise fraudulently disposed of, or of having offered for sale, pawn, pledge, exchange, or other disposal any such materials, tools, or apparatus, knowing them to have been purloined, or embezzled, or received from some person fraudulently disposing thereof, shall be supported by evidence to raise a strong presumption of guilt, such justice shall commit such person to the common goal or house of correction, in order that he may be brought forward for trial at the next petty sessions, unless he enter into such bail with two sufficient [*451]

sureties as may be required for his appearance before such Court on any day to be fixed by such justices.

7. And be it enacted, that if any person entrusted, employed, or contracting to prepare, work up, or manufacture, or to have prepared, worked up, or manufactured, either by himself or by any person or persons to be employed by or under him, or by himself jointly with any person or persons to be employed by or under him, any woollen, worsted, linen, cotton, flax, mohair, or silk materials, shall not prepare, work up, or manufacture, or cause to be prepared, worked up, or manufactured, the said materials, and return the same within seven clear days after the time which shall have been agreed upon between such person and the owner of the said materials or other the person entrusting him therewith, and in case no such time shall have been so agreed upon, then within seven clear days after being required so to do (unless prevented by some reasonable and sufficient cause to be allowed by the justices before whom he shall be brought,) or shall leave or return such materials without having performed, as he could and ought to have done, the work he was employed to perform thereon or thereto, and without the consent of the person entrusting him with such materials as aforesaid, or shall damage the same, or if any person shall contract or engage to work or be employed to do or perform, or to have done or performed, any work in any of the said manufactures or connected therewith or incidental thereto, or any parts, branches, or processes thereof, either by himself or by any person or persons to be employed by or under him, and whether such contract or engagement shall be to work or be employed for any person exclusively, or for all or part of his time, or for specific work, or otherwise, and whether such person is to be paid according to the value or amount of the work done, the time employed, or in any other manner whatsoever, and shall neglect to fulfil such contract or engagement, or absent himself from such work or employment before such notice (if any) as shall have been [*452] agreed upon between the said parties for determining the *said contract or engagement shall have expired, or without giving such notice, or contrary to the terms of such contract or engagement (unless prevented as aforesaid) to be allowed as aforesaid, then and in every such case such person, being thereof lawfully convicted on oath before two or more justices of the peace, shall forfeit any sum not exceeding two pounds as to such justices shall seem meet, and also, in case the said materials shall be damaged, the amount of the injury done thereto, to be ascertained by the said justices, together with costs, and every such forfeiture shall be applied under the direction of the justices so convicting in manner following, (that is to say) in the first place in making such satisfaction to the party injured as the said justices shall think proper, and the remainder, if any, shall be applied in the same manner as any penalty under this act, and in default of payment of such forfeiture and costs immediately on conviction, or within such period as the justices so convicting shall direct, the said justices may either immediately, or at any time after such conviction, commit any person so convicted to the common gaol or house of correction, there to be imprisoned with or without hard labour, as to the said justices shall seem meet, for

any term not exceeding two calendar months, unless the amount of such forfeiture and costs be sooner paid.

8. And be it enacted, that upon proof on oath before a justice of the peace, that there is reasonable cause to suspect that any person has in his possession or on his premises any such materials, tools, or apparatus as aforesaid which have been purloined, embezzled, or otherwise fraudulently disposed of, it shall be lawful for the said justice, and such justice is hereby required to grant his warrant to search the dwelling-house and premises of such person, and if any such property shall be found therein to cause such materials, tools, or apparatus, and the person in whose possession or on whose premises the same shall be found, to be brought before him or some other justice of the peace to be dealt with in the same manner as any person brought before a justice under the enactment next hereinafter contained.

9. And be it enacted, that every peace officer and constable, and every watchman duly appointed by law, during such time as he shall be on duty, shall and may apprehend or cause to be apprehended any person whom he may reasonably suspect of having or carrying or in any way conveying, at any time after sunsetting and before sunrising, any such materials, tools, or apparatus as aforesaid, suspected to be purloined, embezzled, or otherwise fraudulently disposed of, and shall lodge such person, together with the property, in a police office or other place of security, in order that he may be brought before a justice of the peace so soon as convenient, who is hereby empowered to discharge such person, or to order his detention until the next court of petty sessions, unless he enter into such bail with two sufficient sureties as may be required for his appearance before *such court on any day to be fixed by the said justice, and if the person so apprehended in the act of committing any such [*453] offence as aforesaid, or of conveying any such property as last aforesaid, shall not produce before the said court the person duly entitled to dispose of such property from whom he bought or received the same, or shall not give an account to the satisfaction of the said court that the property is honestly come by, then the person so apprehended shall be deemed and adjudged guilty of a misdemeanor, and be punished in manner hereinafter mentioned, although no proof shall be given as to whom such property belongs.

10. And be it enacted, that it shall be competent for the party accused, in all proceedings brought under the authority of this act, to move for and obtain an adjournment of the time fixed for trial for such a reasonable time as may appear to the court to be necessary for the party accused to produce the person, duly entitled to sell or dispose of the said property, of whom he bought or received the same, or evidence respecting the same, but the party accused and requesting such adjournment shall be detained in custody or committed to prison, unless he enter into such bail, with two sufficient sureties, as shall be required for his appearance before such court at such time and place as shall be appointed.

11. And be it enacted, that any person who shall be deemed and adjudged guilty of a misdemeanor agreeably to any of the provisions of this act, shall, in addition to being deprived, without compensation, of any

such materials, tools, and apparatus which have been purloined, embezzled, or otherwise fraudulently disposed of, and which shall have been found in his possession, forfeit any sum not exceeding twenty pounds for such offence, together with costs, upon being thereof lawfully convicted, by the oath of one or more credible witness or witnesses, before two or more justices of the peace; and every such forfeiture shall be applied under the direction of the justices so convicting in manner following, (that is to say,) in the first place in making such satisfaction to the party injured as the said justices shall think fit, and the remainder (if any) shall be applied in the same manner as is hereinafter directed for the disposal of any other penalty under this act, and in default of payment of such forfeiture and penalty, with costs, immediately on conviction, or within such period as the court shall direct, any justice or justices may issue his or their warrant to distrain and sell the goods and chattels of the person so convicted for the amount thereof and costs, and the proceeds of any distress, after paying the forfeiture and costs, and also the costs of such distress, shall be paid over to the person convicted; but if no sufficient distress shall appear or shall be found whereon to levy the said forfeiture and costs, any justice or justices may either immediately, or at any time after such conviction, commit any person so convicted to the common gaol or [*454] house of correction, to be *imprisoned there with or without hard labour, as to the said court shall seem meet, for any term not exceeding four calendar months, unless the amount of such forfeiture and costs, or so much thereof as shall have been paid previously to the commencement of such imprisonment, be sooner paid.

12. And be it enacted, that where no proof shall be given, at the time of conviction, of the ownership of property found in the possession of a person convicted under this act, the justices or court shall cause the property so found to be deposited in some safe place for any time not exceeding thirty days, and shall, if the property be of sufficient value to pay the expenses thereof, or an advertisement inserted in one or more of the public newspapers of the town or city where or nearest the place where the same was found, and by fixing a notice on some public place, describing such property, and where the same may be inspected, or in case of the said property not being of sufficient value to pay the said expenses, then by fixing such notice as aforesaid only; and in case any person shall prove his own or his employer's ownership or property therein, upon oath, to the satisfaction of a justice, restitution of such property shall be ordered to the owner thereof, after paying the reasonable cost of removing, depositing, advertising, and giving notice of the same; but if no ownership be proved to such property, the justice shall, at the termination of thirty days, order such property to be sold, and after deducting the charges aforesaid with the charges of sale, shall order the residue to be applied in the same manner as is hereafter directed for the disposal of any other penalty under this act.

13. And be it enacted, that it shall be lawful for the owner of any such materials as aforesaid, or any other person duly authorized by him, or other the person who shall have so entrusted such materials from time to time as occasion shall require, to demand leave of entrance and enter,

at all reasonable hours in the day time, into the shops or outhouses of any person employed to work up or manufacture, either by himself or by any other person under him, of any of the said materials, or other place or places where the work shall be carried on, and there to inspect the state and condition of such materials; and in case of refusal or neglect by any such person or persons so employed to permit such entrance or inspection, such person shall, for so refusing to permit such entrance or inspection, forfeit any sum not exceeding twenty shillings as the justices, before whom he shall appear or be brought, shall think proper, to be applied in the same manner as is hereinafter directed for the disposal of any other penalty under this act: provided always, that nothing herein contained shall authorize any such owner or other person as aforesaid to inspect any frame, tools, or apparatus wherewith such materials are worked up, in case such frame, tools, or apparatus comprise any new invention or improvement not disclosed to the public.

*14. And be it enacted, that if any manufacturer, agent, or any other person in his employment or service, shall make oath [*455] before a justice of the peace that any such materials, tools, or apparatus as aforesaid have been entrusted to any person as aforesaid, and that he has absconded, or that the deponent has just cause to suspect and does suspect that such person is about to abscond, it shall be lawful for such justice, and he is hereby required to issue his warrant to apprehend such person and bring him before him or some other justice of the peace, and if such person shall have absconded, or shall not forthwith give security, to be approved of by the said justice, for the return, in a finished state, of all such materials so entrusted to him within such time as shall be then agreed on, such justice shall, by warrant, order any constable, with his assistants, to enter the house or other premises of such person and take possession of all such materials, tools, or apparatus so delivered to him as aforesaid, and to bring the same before the said justice or any other justice, when such justice shall direct the same to be delivered to the owner or his agent or servant, or other person duly authorized by him, and shall forthwith release the person in custody; but if all such materials, tools, or apparatus shall not be found in the house or other premises or the possession of such person, or shall not be produced before such justice, such person shall be deemed and taken to have purloined or embezzled such materials, tools, or apparatus, or such part thereof as shall not be found or produced, and shall be liable to any of the punishments awarded for such offence.

15. And be it enacted, that if any person shall receive any of the aforesaid materials in a fictitious name, in order to be manufactured, every such person so offending, and being convicted thereof on the oath of one or more credible witness or witnesses before two or more justices, shall, for every such offence, be liable to the same punishment as is hereinbefore directed in respect to persons not fulfilling their engagements.

16. And be it enacted, that in cases where any person shall have been committed for purloining, embezzling, or fraudulently disposing of all or any part of such materials, tools, or apparatus as aforesaid which may

have been entrusted to him, or shall have been convicted of any other offence against any of the provisions of this act, it shall be lawful for the justice who so committed such person, or for any justice or court before whom he has been convicted for that or any other offence, and he or they is or are hereby required to issue his or their warrant, authorizing a constable, with his assistants, to enter the house and premises of such person, and take possession of all such property so entrusted as shall be found therein, and to bring the same before the said justice or court, when the said justice or court shall direct the same to be delivered to the manufacturer, agent, or person duly authorized to receive the same.

17. And be it enacted, that if any manufacturer or other party [*456] *employing, contracting, or engaging with any person for any work in any of the said manufactures, or connected therewith, or incidental thereto, or any parts, branches, or processes thereof, and whether such work is to be performed by the said person or by any person or persons to be employed by or under him, or by himself jointly with any person or persons to be employed with by or under him, and whether the contract or engagement shall be to work or be employed for such manufacturer or other party exclusively, or for all or part of his time, or for specific work or otherwise, and whether such person is to be paid according to the nature or amount of the work done, the time employed, or any other manner, shall not from time to time pay and discharge all such sums of money, wages, and hire as shall be justly due and payable to any such person, it shall be lawful for a justice of the peace, on complaint made for that purpose, to summon such manufacturer or other party to appear at a time and place to be named in such summons, and for any two or more justices of the peace to hear and determine such complaint, and order payment of such sum as shall appear to such justices to be justly due and payable, together with costs for loss of time and recovering the same, and in default of payment immediately or within such period as the said justices shall direct, the said justices shall issue their warrant to levy the same by distress and sale of the goods and chattels of the said manufacturer or other party, and the said justices, if they shall think fit, may also, by order in writing, authorize such person to return his work unfinished, in which case such person shall not be liable to the penalties awarded by this act.

18. And be it enacted, that no frame, loom, or machine, materials, tools, or aparatus which shall be entrusted for the purpose of being used or worked in any of the said manufactures, or any work connected therewith, or incidental thereto, or any parts, branches, or processes thereof, whether such frame, loom, or machine, materials, tools, or apparatus shall or shall not be rented or taken by the hire, shall at any time or times hereafter be distrained or seized, or be liable to be distrained or seized for rent or for debt, or under any execution or other proceedings whatever, unless the rent be due or the money be owing by the owner of the said frame, loom, or machine, or of the said materials, or tools, or apparatus aforesaid, or of any part thereof respectively.

19. And be it enacted, that if any landlord or other person by virtue of any distress, warrant, execution, or other proceedings for rent in

arrear, or money due or alleged to be due by any person whomsoever, shall distrain, seize, carry off, sell or otherwise dispose of any frame, loom, or machine, materials, tools, or apparatus belonging to any other person which shall have been entrusted for the purpose of being used or worked in any of the said manufactures, or any work connected therewith or incidental thereto, or any parts, branches, or process thereof, and whether *the same shall or shall not be rented or taken by the hire, or shall distrain, seize, carry off, sell, or otherwise dispose [*457] of any materials as aforesaid, or any tools or apparatus as aforesaid, belonging to any other person, and shall refuse to restore possession of all such frames, looms, machines, tools, or apparatus to the person owning, letting, or entrusting the same when demanded by him or some person duly authorized by him of the said landlord or other person, or the person acting as agent or bailiff of such landlord or other person, it shall and may be lawful to and for any justice of the peace, upon complaint on oath before him, to summon the said landlord or other person to appear before any two or more justices of the peace to answer the said complaint, and, on proof of the said offence, the said justices may thereupon order the property so seized, distrained, carried off, or sold, to be forthwith restored, and issue their warrant to a constable or constables empowering him or them to seize the said property wherever the same shall be found, and deliver possession thereof to the person owning, letting, or entrusting the same, and to levy by distress and sale of the goods of the said landlord or other person the costs of obtaining the said order and recovering and obtaining possession of the said property, and in case the said property cannot be found and seized within a time not exceeding twenty-one days, to be limited in the said warrant, or in case the said property shall have been damaged by the same having been distrained, seized, carried off, or sold, then it shall be lawful for such two justices or any other two justices, on proof thereof, (the said landlord or other person having been first summoned by a justice) to issue their warrant to levy by distress and sale of the goods and chattels of such landlord or other person the full value of the said property or the amount of such damage as the case may be, together with all costs of recovering and levying the same.

20. And be it enacted, that if any person or persons shall obliterate, efface, or alter the owner's name or initials, or other distinguishing mark on any frame, loom, or machine, or any bar or part thereof, or the moulds thereof, without the order or authority of the owner thereof, he shall, on conviction thereof before two justices of the peace, forfeit any such sum not exceeding two pounds as such two justices shall order and direct, to be applied in the first place in paying the costs of the proceedings before such justices, and the surplus, if any, to the party injured, and in default of payment of such forfeiture immediately on conviction or within such period as the justices so convicting shall direct, then the said justices may either immediately or at any time after such conviction commit any person so convicted to the common gaol or house of correction, there to be imprisoned with or without hard labour as to the said justices shall seem meet, for any term not exceeding two calendar months, unless the amount of such forfeiture be sooner paid.

[*458] *21. And for the discouragement of frivolous and vexatious informations and prosecutions under this act, be it enacted, that it shall be lawful for any justices or court of petty sessions before whom any case under this act is tried to award costs to the defendant with an allowance for his loss of time in case of acquittal, to be paid by the prosecutor, and also if it shall appear to such justices or court that the charge was made from a malicious, vexatious, or frivolous motive, or in case the party shall be charged with embezzlement of materials by reason of any deficiency in the weight of the materials which he shall have returned to the person by whom they were entrusted to such party as compared with the weight of the materials received, and it shall be proved upon the hearing of the case that such materials were knowingly and fraudulently delivered to the party charged whilst in a damp state, so that the apparent weight thereof was thereby increased, it shall be lawful for such justices or court to award to the defendant such further sum of money not exceeding twenty pounds, as to such justices or court shall seem fit to be paid by such prosecutor as a compensation for the injury done, and, in default of payment, such costs and allowances and compensations may be levied by distress and sale of the prosecutor's goods.

22. And be it enacted, that where any person shall be charged on oath with any offence punishable under this act, one justice may receive the original information and summon the person charged to appear before any two justices of the peace at a time and place to be named in such summons, and if he shall not appear accordingly, then the justices there present may either proceed to hear and determine the case ex parte, or any of such justices may issue a warrant for apprehending such person and bringing him to answer the said charge before any two or more justices, or the justice before whom the charge shall be made may, if he shall so think fit, issue such warrant in the first instance without any previous summons, and commit the person so charged to prison in order that he may be brought forward for trial, (unless he enter into such bail as may be required by such justice for his appearance at such time and place as shall be appointed), and the justices before whom the person charged shall appear or be brought shall proceed to hear and determine the case, and after adjudication all and every the subsequent proceedings to enforce obedience thereto, whether respecting the penalty, forfeiture, distress, imprisonment, costs, or other matter or thing relating thereto, may be enforced by any one of the said justices.

23. And be it enacted, that every summons to be granted by a justice of the peace under this act may be served by delivering a copy thereof to the party, or by delivering such copy at the party's usual place of abode to some inmate thereat and explaining the purport thereof to such inmate.

24. Provided always, and be it enacted, that every complaint and [*459] prosecution under this act shall be commenced within six *calendar months after the commission of the offence, unless the offending party shall have in the mean time left the country and not otherwise, and that the informer or prosecutor, or any person aiding, abetting, party or privy to the commission of the offence charged, shall

in every case under this act be deemed a competent witness to prove the offence.

25. And be it enacted, that in all complaints, warrants, proceedings, or prosecutions under this act any justice or justices of the peace and the court of petty sessions for the county, city, borough, or place where the offence shall be committed or the complaint arise, or where the said materials, frame, loom, machine, tools, or apparatus shall be given out or entrusted lent or hired, or where the manufacturer, master, or employer shall carry on his trade or business, shall have full power and authority to act and to hear and determine such complaint, warrant, proceeding, or prosecution, and do all other matters incidental thereto: provided always, that in all convictions or adjudications under this act one at least of the convicting or adjudicating justices shall be a person not engaged in any manufacture, trade, occupation, or employment to which this act extends, and shall not be the father, son or brother of any such person.

26. And be it enacted, that all forfeitures and penalties upon convictions under this act not specially provided for shall be paid to the sheriff or other proper officer of the county, city, borough, or place in which such conviction shall take place for her majesty's use, and shall be returned to the court of quarter sessions under the provisions of an act passed in the third year of the reign of his late majesty king George the Fourth, intituled "An act for the more speedy return and levying of fines, penalties, and forfeitures, and recognizances estreated."

27. And be it enacted, in every case of summary conviction or adjudication under this act not specially provided for, where the sum forfeited or adjudged to be paid, or which shall be imposed as a penalty by any justice or justices of the peace, together with costs, if awarded, which costs such justice or justices is and are hereby authorized to award if he or they shall think fit in any proceeding, adjudication, or conviction under this act, shall not be paid immediately, or within such period as the said justice or justices shall direct, or where a warrant of distress shall be issued and no sufficient distress shall be found, it shall be lawful for the convicting justice or justices to commit the offender to the common gaol or house of correction, there to be imprisoned with or without hard labour, according to the discretion of the said justice or justices, for any term not exceeding two calendar months, when the amount of the sum forfeited or adjudged to be paid, or of the penalty imposed, together with costs, shall not exceed five pounds, and for any term not exceeding three calendar months in any other case, unless the amount and costs be sooner paid.

28. And be it enacted, that the justices before whom any *person shall be convicted of any offence against this act may cause [*460] the conviction to be drawn up on paper or parchment in the following form of words, or in any other form of words to the like effect, and with such variations as the case shall require: (that is to say,)

to wit: } BE it remembered, that on the day of in the year of our Lord at in the of C. D. is convicted before us, A. B. and J. P., two his majesty's justices of the peace for the said for that he the said C. D. [*here*

specify the offence, and the time and place where the same was committed, as the case may be,] and we do adjudge that the said C. D., shall for the said offence forfeit and pay [*here state the penalty actually imposed, or the penalty and also the sum adjudged as the value of the articles or the amount of the injury, as the case may be,*] and also pay the sum of for costs [*if so ordered*]; and we direct that the sum of shall be paid to E. F., the party aggrieved, on the day of [instant *or* next ensuing,] and that the sum of shall, on the day of [instant *or* next ensuing,] be paid and applied according to the direction of the statute in such case made and provided, [*or as the case may be,*] and that the sum of for costs shall be paid to the complainant [*if so ordered.*] Given under our hands and seals the day and year first above written.

29. And be it enacted, that in all cases of summary conviction under this act where the sum adjudged to be paid shall exceed twenty shillings, or the imprisonment shall exceed one calendar month, any person who shall think himself aggrieved by any such conviction may appeal to the next court of general or quarter sessions which shall be held for the county, city, borough, or place where such conviction shall have been made, (such person at the time of such conviction giving to the justices so convicting, or to the justice so presiding at the court of petty sessions at which such conviction shall take place, notice in writing of his intention to appeal and also entering into a recognizance at the time of such notice with two sufficient sureties conditioned personally to appear at the said sessions and to try such appeal, and to abide the judgment of the court thereupon, and to pay such costs as shall by the court be awarded,) and upon such notice being given and such recognizances being entered into, the justice or justices before whom the same shall be entered into shall liberate such person if in custody, and the court at such sessions shall hear and determine the matter of the appeal, and shall make such order therein with or without costs to either party, as to the court shall seem meet, and in case of the dismissal of the appeal or the confirmation of the conviction, the said court shall order and adjudge the offender to pay such costs, if any shall be awarded, and shall, if necessary, issue process for enforcing payment of the same: and it shall be lawful for the said court, or on *the production of a certificate under the hand of the [*461] clerk of the peace for the said county, city, borough, or place, or his deputy, for any justice or justices of the peace for such county, city, borough, or place either immediately or at any time thereafter to issue a warrant of distress and sale, or a warrant for the apprehension and commitment of such offender for such period of time as together with the days during which such person so convicted shall have been imprisoned, if any, previously to being discharged by reason of such appeal shall amount to the same period or term of imprisonment for which such person was adjudged to be imprisoned at the time of conviction, or to issue a warrant of distress and sale, and if there be no sufficient distress, a warrant of apprehension and commitment, as the case may require, in like manner in all respects as any justice or justices could or might have done in case no notice of appeal had been given.

30. And be it enacted, that no order or conviction, or proceedings touching the same respectively, nor adjudication made or appeal therefrom shall be quashed for want of form or be removed by certiorari or otherwise into any of her majesty's superior courts of record, and that no warrant of commitment shall be held void by reason of any defect therein, provided it be therein alleged that it is founded on a conviction, and there be a good and valid conviction to sustain the same, and that where any distress shall be made for levying any money by virtue of this act the distress itself shall not be deemed unlawful, nor the party making the same be deemed a trespasser on account of any defect or want of form in the summons, warrant, conviction, warrant of distress, or other proceedings relating thereto, nor shall the party distraining be deemed a trespasser from the beginning on account of any irregularity afterwards committed by him, but the person aggrieved by such irregularity may recover full satisfaction for the special damage (if any) upon(*v*) an action on the case.

31. And be it enacted, that for the protection of persons acting in the execution of this act all actions and prosecutions for damage to be commenced against any person for anything done in pursuance of this act shall be laid and tried in the county where the fact was or is charged to have been committed, and shall be commenced within two calendar months after the fact committed, and not otherwise, and notice in writing of such action and of the cause thereof shall be given to the defendant one calendar month at least before the commencement of the action, and in any such action the defendant may plead the general issue, or in case of any action of replevin may avow generally that the goods and chattels in question were taken under and by virtue of this said act, and may give this act *and the special matter in evidence at the trial to be had thereupon, and no plaintiff shall recover in any such action if tender [*462] of sufficient amends shall have been made before such action brought, nor if a sufficient sum of money shall have been paid into court after such action brought by or on behalf of the defendant or avowant: provided always, that in all such actions of damages the plaintiff shall be bound to establish not merely that damages have been suffered by him, but that the same have been wilfully and maliciously caused by the defendant or avowant.

32. And be it enacted, that nothing in this act contained shall extend to any person for any offence committed against the said hereinbefore recited acts, or any of them, before the passing of this act, but every such offender shall and may be prosecuted and punished in the same manner as if this act had not been made.

33. And be it enacted, that nothing in this act contained shall extend to Scotland or Ireland or be construed to extend to repeal any act or statute or part thereof now in force and not repealed by this act.

34. And be it enacted, that this act shall not extend or be construed to extend to any manufacture, trade, occupation, or employment, except

(*v*) Sic.

only the manufacture,(v) trades, occupations, and employments following, (that is to say,) the manufacture of woollen, worsted, linen, cotton, flax, mohair, or silk materials, in, on, or by the stocking frame, warp machine, or any other machine employed in the manufacture of framework knitted or looped fabrics, and every trade, occupation, operation, or employment whatsoever connected with or incidental to the manufacture of stockings, gloves, and other articles of hosiery.

35. And be it enacted, that in all cases under this act the singular is to include the plural, and the masculine the feminine, and in an indictment or information for offences against the property of partners, joint-stock companies, or trustees, it shall be sufficient to lay the ownership in the name of one partner or trustee and another or others; that the words "woollen, worsted, linen, cotton, flax, mohair, or silk materials," shall be construed to extend to any of the said materials mixed with each other or with any material or materials, and that the words "manufacture" and "work" shall extend to all trades, occupations, operations, and employments whatsoever connected with or incidental to the manufacture of any of the said materials or any parts, branches, or process thereof, and likewise to such materials whether the same or any part thereof be or be not, in the whole or in part, first wrought, made up, or manufactured or converted into merchantable wares.

[*463] *36. And be it enacted, that this act shall commence on the first day of August one thousand eight hundred and forty-three.

37. And be it enacted, that this act may be amended or repealed by any act to be passed in this present session of parliament.

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7 & 8 Vict. c. 15.

An Act to amend the Laws relating to Labour in Factories.(w)
[6th June, 1844.]

Whereas the laws relating to labour in factories require to be amended: be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in

(v) See Reg. v. Button, 11 Q. B. 941.

(w) See also 10 & 11 Vict. c. 29; 13 & 14 Vict. c. 54, post. By 9 & 10 Vict. c. 40, after reciting 3 & 4 Wm. 4, c. 103, and 7 & 8 Vict. c. 15, and that the said acts had been construed to apply to ropeworks; and it is expedient to relieve ropemakers from the effect of such construction and of the said acts; it is declared and enacted, "that no ropery, ropewalk or ropework, in which machinery moved by steam, water, or other mechanical power is not used for drawing or spinning the fibres of flax, hemp, jute or tow, but only for laying or twisting or other process of preparing or finishing the lines, twines, cords, or ropes, and which has no internal communication with any buildings or premises forming or forming part of a mill or factory within the meaning of the said acts, except such as is necessary for the transmission of power, shall be deemed to be a mill or factory within the provision of the said acts or of either of them, shall be deemed to apply to the employment of children, young persons, or women in any such ropery, ropewalk or ropework."

this present parliament assembled, and by the authority of the same, that this act shall take effect from and after the first day of October in the year one thousand eight hundred and forty-four, except any provisions for the taking effect of which any other time shall be hereinafter specially limited, all which last mentioned provisions shall take effect from and after such time as shall be hereinafter specially mentioned in that behalf.

2. And be it enacted, that after the passing of this act no *inspector of factories shall have power in that capacity to act as a [*464] magistrate, or to make rules, regulations, and orders as authorized by an act, hereinafter called "the Factory Act," passed in the fourth year of the reign of his late Majesty, and intituled "An Act to regulate the labour of Children and young Persons in the Mills and Factories of the United Kingdom," except as hereinafter mentioned; and that no inspector or person appointed to superintend the execution of the provisions of the Factory Act and of this act, under the direction of an inspector, hereinafter called a sub-inspector, shall be liable to serve upon any jury, or to serve any parochial or municipal office, so long as he shall continue to hold the office of inspector or sub-inspector.

3. And be it enacted, that every inspector, and sub-inspector shall have power to enter every part of any factory at any time, by day or by night, when any person shall be employed therein and to enter by day any place which he shall have reason to believe to be a factory, and to enter any school in which children employd in factories are educated, and at all times to take with him into any factory the certifying surgeon of the district hereinafter mentioned, and any constable or other peace officer whom he may need to assist him, and shall have power to examine, either alone or in the presence of any other person, as he shall think fit, every person whom he shall find in a factory or in such a school, or whom he shall have reason to believe to be or to have been employed in a factory within two months next preceding the time when he shall require him to be examined touching any matter within the provisions of this act, and the inspector or sub-inspector may, if he shall see fit, require such person to make and sign a declaration of the truth of the matters respecting which he shall have been or shall be so examined; and every inspector or sub-inspector shall have power to examine the register, certificates, notices, and other documents kept in pursuance of this act; and every person who shall refuse to be examined as aforesaid, or who shall refuse to sign his name or affix his mark to a declaration of the truth of the matters respecting which he shall have been examined, or who shall in any manner attempt to conceal or otherwise prevent any child or other person from appearing before or being examined by an inspector or sub-inspector, or who shall prevent or knowingly delay the admission of an inspector or sub-inspector to any part of a factory or school, or shall prevent an inspector or sub-inspector from examining any register, certificate, notice, or other document kept in pursuance of this act, shall be deemed guilty of wilfully obstructing the inspector or sub-inspector in the execution of the powers entrusted to him.

4. And be it enacted, that the provisions of an act passed in the twenty-fourth year of the reign of King George the Second, intituled "An Act

for the rendering Justices of the Peace more safe in the execution of their Office, and for indemnifying *Constables and others acting in obe- [*465] dience to their Warrants," as amended by any subsequent act, so far as they relate to rendering justices of the peace more safe in the execution of their office, shall extend to protect the inspectors and sub-inspectors in the exercise of their duties under this act.

5. And be it enacted, that a proper office, to be called "The Office of the Factory Inspectors," shall be provided in London or Westminster for the use of the inspectors, and for the preservation of the factory records, and all documents relating to the several proceedings under this act; and one of her Majesty's principal Secretaries of State shall appoint from time to time such clerks and servants as may be deemed necessary to carry on the business of the said office, and may at pleasure remove them or any of them; and the Commissioners of her Majesty's Treasury of the United Kingdom of Great Britain and Ireland shall fix the salaries of the clerks and servants in fit proportion acording to the duties they may have to perform.

6. And be it enacted, that one of her Majesty's principal Secretaries of State, or the inspectors, with the approval of such principal Secretary, from time to time may make regulations for the management of the said office, and for regulating the duties of the several inspectors and sub-inspectors, and of the clerks and servants of the said office, in the execution of this act, so that they be not contrary to the provisions herein contained; and the regulations so made and approved shall be binding on the said inspectors and sub-inspectors, clerks, and servants respectively.

7. And be it enacted, that after the passing of this act every person, on beginning to occupy a factory, shall within one month send, addressed "To the Office of the Factory Inspectors, London," a written notice, containing the name of the factory, the place, township, parish, and county where it is situated, the post office to which he desires his letters to be addressed, the nature of the work, the nature and amount of the moving power, and the name of the firm under which the business of the factory is to be carried on.

8. And be it enacted, that after the passing of this act any inspector shall have power to appoint a sufficient number of persons practising surgery or medicine to be certifying surgeons, for the purpose of examining persons who shall be brought before them to obtain the surgical certificates of age required by the Factory Act and by this act, and of giving the said certificates, and shall from time to time make regulations for their guidance, and shall in every such appointment specify the factories or district for which each surgeon is appointed, and may from time to time annul any such appointment, and in like manner make another or others; but every appointment of a certifying surgeon, and every order annulling such appointment, may be revoked by the Secretary of State, on appeal made to him for either purpose; and the inspectors of the dis- [*466] trict shall *make known the name of the certifying surgeons so from time to time appointed or discontinued to the occupiers of the factories in that district in such manner as to him shall seem fit; but

no surgeon being the occupier of a factory, or having a beneficial interest in any factory, shall be a certifying surgeon.

9. And be it enacted, that the certificates of age required by the Factory Act or by this act, herein called surgical certificates, shall be given according to the form and directions contained in the Schedule (A.) annexed to this act; and the certificates given by any such certifying surgeon shall be as valid as if countersigned by an inspector, justice of the peace, or burgh magistrate; and the name of every person for whom a certificate of age is required by the Factory Act or by this act, and the date of the first day of employment or re-employment of such person shall be registered in the form and according to the directions given in the Schedule (B.) annexed to this act, before it shall be lawful to employ such person in a factory: provided always, that no surgical certificate shall be required for any young person above the age of sixteen years.

10. And be it enacted, that no such surgical certificate given by any person who is not an appointed certifying surgeon shall be of any force, unless it is given by a person duly authorized by an university or college, or other public body having authority in that behalf, to practice surgery or medicine, and countersigned, according to the form and directions given in the Schedule (A.) to this act annexed, by some justice of the peace, not being the occupier of a factory, and not being the father, son, or brother of the occupier of a factory; and no person shall countersign any such surgical certificate in the absence of the person named therein, or without proof that the person brought before him is the same to whom the certificate was granted.

11. And be it enacted, that no person shall grant any surgical certificate required by the Factory Act or by this act, except upon personal inspection of the person named therein; and no certifying surgeon shall examine any person for the purposes of this act, or sign or issue any such surgical certificate, elsewhere than at the factory where such person is to be employed, unless for special cause, to be allowed by an inspector; and if a certifying surgeon shall refuse to grant a certificate of age for any person presented to him for such examination, he shall give, when required, instead of such certificate, a paper specifying under his hand the reasons for such refusal, in the form and directions given in the Schedule (A.) to this act annexed.

12. And be it enacted, that if the occupier of a factory shall agree in writing with the certifying surgeon of a district for the payment to be made by the occupier of the factory to the certifying surgeon for the examination of persons for whom surgical certificates are required by the Factory Act or by this act, and if the terms of such agreement shall be in conformity with such regulations for the guidance of the surgeons as shall be made by *the inspector of the district, and shall be countersigned by the inspector in token of such conformity, all penalties which may be incurred by any party for breach of such agreement may be recovered as other penalties under this act may be recovered, and shall be applied as other penalties under this act are directed to be applied, and no such agreement shall be liable to any stamp duty. [*467]

13. And be it enacted, that an inspector shall fix the amount of fees to

be paid by the occupier of a factory, and the times when such fees shall be paid to the certifying surgeon, and also the times when such certifying surgeon, shall visit a factory, provided he shall be required to fix such fees and visits by the occupier of a factory; and the fees so to be fixed by the inspector shall not in any case where the surgeon shall examine more than one person exceed one shilling for each person who shall be presented to him at the factory by the mill owner or his agent to be examined, together with sixpence for every half mile that the distance of the factory from the residence of such surgeon shall exceed one mile; and such fees, including mileage, shall not be less that one shilling and shall in no case exceed five shillings for any one visit, except when upon such visit the certifying surgeon shall examine for the said certificates of age more than ten persons who may be brought before him as aforesaid, in which case he shall receive sixpence for each person that he may so examine, instead of all other fees; and in any case where a factory, situated within the distance of one mile from the residence of a certifying surgeon the fee for such factory shall not exceed two shillings and sixpence for each visit, except when at any one visit he shall examine for the said certificates of age more than five persons who may be brought before him as aforesaid, in which case he shall receive sixpence for each person that he may so examine, instead of all other fees; and no certifying surgeon shall receive more than sixpence for any certificate which he may be allowed by an inspector, as hereinbefore provided, to sign or issue otherwise than at the factory where the person is to be employed; and the occupier of any factory shall pay such fees to the certifying surgeon at the time of signing such certificates, or at any other time when he may be directed by the inspector to do so; and the occupier of such factory may deduct the fee or any part thereof, not exceeding in any one case the sum of three-pence, from the wages of the person for whom the certificate may have been granted; but in any case where such agreement as aforesaid has been executed between an occupier of a factory and the certifying surgeon the amount named in such agreement shall be instead of the fees fixed by any inspector in virtue of this act: provided always, that no certifying surgeon shall be required to visit any factory situated within three miles of his residence oftener than once in each week, or to visit any factory situated at a greater [*468] distance *than three miles oftener than once in every fortnight, unless with the consent of the occupier of the factory.

14. And be it enacted that no person who shall be employed in a factory at the time when this act shall come into force under a surgical certificate granted under the factory act, shall be required to have a new surgical certificate, in the form and manner provided by this act, so long as he shall continue in the same factory; but every inspector and sub-inspector may annul any surgical certificate granted under this act, and any surgical certificate granted before the passing of this act, by writing across the surgical certificate the word "annulled," with his name, and the date of annulling such certificate; provided that in either case he shall have reason to believe the real age of the person mentioned therein to be less than that mentioned in the certificate, or provided the certifying surgeon of the district shall, upon reference made to him, deem such person to be then

of deficient health or strength, or by disease or bodily infirmity incapacitated for labour, or liable to be injured by continued employment: and no certificate so annulled shall be valid in respect of the person named therein for the purposes of this act from the day when the certificate shall have been so annulled; and the production of the certificate shall be evidence that the certificate was annulled on the day so stated.

15. And be it enacted, that in case any person shall be desirous of proving the real age of any person for whom a certifying surgeon shall have refused to grant a certificate of age for the purpose of this act, or whose surgical certificate any inspector or sub-inspector shall have annulled, the inspector or sub-inspector shall, on demand, give to such person a requisition under his hand, in a form to be approved of by the inspectors and by the registrar general, for the production of a duly certified copy of the entry of the birth or baptism of such person; provided the party demanding the same shall declare the names of such person and of his parents, with the place where and the year in which he was born or baptized, which particulars shall be set forth in the requisition; and every party to whom such requisition shall have been given shall be entitled, upon payment of one shilling, to receive, on personal application, or on application in writing, in such form and under such regulations as shall be approved of by the inspectors and registrar general, from any minister, registrar, or other person having the care of any register of births or baptisms in which the birth or baptism of such person is entered, a duly certified copy of the entry in such register, which shall be indorsed on the aforesaid requisition, and shall be signed by the minister, registrar, or other person having charge of such register; and such payment of one shilling shall be instead of all other fees or payments to which such minister, registrar, or other person shall be entitled; and if the said certified copy, proving the age of the *person named therein to be such as to entitle him to have the surgical certificate required, shall be produced to the certifying surgeon of the district, he shall examine the same, and if it shall appear to him that the said certified copy has not been altered or falsified in any manner, the certifying surgeon shall thereupon, without further fee or reward, give a surgical certificate in the form provided for that case in Schedule (A.) to this act annexed, and shall write the word "Examined" upon the certified copy of the entry of the birth or baptism which he shall have received, with his signature, and the date of such signature, and shall send such certified copy by the post to the sub-inspector of the district, who shall send a receipt for the same by post to the said surgeon, and shall keep such certified copy of the entry of the birth or baptism, for future reference, if necessary; and if any inspector of factories shall require a certified copy of the entry of the birth of any person employed in any factory from the office of the registrar general, he, or any person deputed by him, shall, on producing a requisition in the form hereinbefore provided, be entitled to examine the indexes to the registers in the general register office, and to receive such certified copy indorsed on the requisition without the payment of any fee; but no certified copy of the entry of any birth or baptism issued in consequence of any such requisition hereinbefore provided shall be admissible in evidence in any court or for any purpose, save for the purpose of this act: provided

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always, that in those cases in which a surgical certificate shall have been refused or annulled in consequence of deficient health or strength, or by reason of disease or bodily infirmity, the inspector or sub-inspector shall not sign the requisition hereinbefore mentioned, and such person shall not be employed on proof of real age only.

16. And be it enacted, that before employing any person requiring a surgical certificate under the factor act as amended by this act, the occupier of the factory shall obtain the surgical certificate, save as hereinafter excepted, and shall keep, and be bound to produce every such certificate, when required, to the inspector or sub-inspector; and no surgical certificate shall be valid except for employment at the factory for which it was originally granted, or, if granted by a certifying surgeon, at any other factory in the occupation of the same person who is occupier of the factory for which the certificate was originally granted, provided such other factory be in the district of the certifying surgeon who granted the certificate, and the certificate be produced in the factory where the person named in the certificate is at work; and the certifying surgeon, as often as he shall visit a factory for the purpose of granting certificates, shall enter in the register of workers the date of his visit, and the other particulars set forth in the form and according to the directions given in Schedule (B.) to this act annexed.

[470] 17. Provided always, and be it enacted, that no occupier of *any factory shall be liable to any penalty for employing any person in any manner not contrary to the other provisions of the Factory Act as amended by this act, without a surgical certificate for any time not exceeding seven working days, or when the certifying surgeon shall reside more than three miles from the factory, for any time not exceeding thirteen working days, provided all surgical certificates for that factory be granted only by the certifying surgeon appointed for that factory; but this enactment shall not be construed to dispense with the certificate of school attendance, or to authorize the employment of any person in respect of whom the certifying surgeon shall have refused to grant such surgical certificate.

18. And be it enacted, that after the passing of this act it shall not be necessary to limewash the walls of any mill, factory, or building, or to whitewash the ceilings of any rooms therein, otherwise than is hereinafter provided; and that all the inside walls, ceilings, or tops of rooms, whether plastered or not, and all the passages and staircases of every factory, which shall not have been painted with oil once at least within seven years, shall be limewashed once at least within every successive period of fourteen months, to date from the period when last whitewashed; and all the inside walls and ceilings or tops of rooms in which children or young persons are employed, and which are painted with oil, shall be washed with hot water and soap once at least within every successive period of fourteen months, as aforesaid.

19. And be it enacted, that after the expiration of six months from the date of this act coming into operation no child or young person shall be employed in any part of a factory in which the wet-spinning of flax, hemp, jute, or tow is carried on, unless sufficient means shall be employed and continued for protecting the workers from being wetted, and, where hot

water is used, for preventing the escape of steam into the room occupied by the workers.

20. And be it enacted, that no child or young person shall be allowed to clean any part of the mill-gearing in a factory while the same is in motion for the purpose of propelling any part of the manufacturing machinery; and no child or young person shall be allowed to work between the fixed and traversing part of any self-acting machine while the latter is in motion by the action of the steam engine, water-wheel, or other mechanical power.

21. And be it enacted, that every fly-wheel, directly connected with the steam engine or water-wheel, or other mechanical power, whether in the engine-house or not, and every part of a steam engine and water-wheel, and every hoist or teagle, near to which children or young persons(*x*) are liable to pass or be *employed, and all parts of the mill-gearing in a factory, shall be securely fenced; and every wheel-race not [*471] otherwise secured shall be fenced close to the edge of the wheel-race; and the said protection to each part shall not be removed while the parts required to be fenced are *in motion* by the action of the steam engine, water-wheel, or other mechanical power *for any manufacturing process*.(*x*)

22. And be it enacted that if any accident shall occur in a factory which shall cause any bodily injury to any person employed therein which shall have been of such a nature as to prevent the person so injured from returning to his work in the factory before nine of the clock of the following morning, the occupier of the factory, or in his absence his principal agent, shall within twenty-four hours of such absence send a notice thereof in writing to the surgeon appointed to grant certificates of age in the district in which the factory is situated, in which notice the place of residence of the person injured, or the place to which he may have been removed, shall be stated; and the surgeon shall send a copy of such notice to the sub-inspector of the district by the first post after the receipt thereof.

23. And be it enacted, that if a certifying surgeon shall receive notice as aforesaid that an accident has occurred which has caused bodily injury to any person employed in a factory for which he has been appointed to grant certificates of age, and that it has been of such a

(*x*) In Coe v. Platt, 2 L. M. & P. 488; S. C. 6 Exc. 752, it was held that the subsequent part of this section is not confined to children and young persons, or even to persons employed in the factory. And it was also held, that a declaration in an action brought for injuries sustained in consequence of non-compliance with this section, must shew that the shaft was in motion for some manfacturing process; and as the declaration in that case did not do so, judgment was arrested. A second action was brought and tried before Alderson, B., at the Liverpool Spring Assizes, 1852. The evidence shewed, that the shaft on the ground floor of the building was in motion, and was in use for the purpose of working the machinery, but the shaft in the upper floor, and by which the accident was occasioned was not in use for that purpose, although in motion from the difficulty of disconnecting it from the main shaft. It was contended, that the upper shaft formed a portion of the lower, and that therefore, at the time of the accident it was in motion for the purpose of working machinery within this section; Alderson, B. however, intimated a contrary opinion, and, the jury having assessed damages, directed a verdict to be entered for the defendant; giving the plaintiff leave to move to enter the verdict for her for the amount found by the jury.

(*x*) Ibid.

nature as to have prevented the person so injured from returning to his [*472] work in the factory the following *morning he shall with the least possible delay proceed to the said factory, and make a full investigation as to the nature and case of such bodily injury, and shall within the next twenty-four hours send to the inspector of the district a report thereof, a copy of which report, together with any other information which he may receive respecting the said accident, the inspector of the district shall send to the office of the factory inspectors as soon as conveniently may be; and the certifying surgeon, for the purpose of such investigations only, shall have the same power, authority, and protection as an inspector, and shall also have power to enter any room in any building to which the injured person may have been removed; and for such investigation the said surgeon shall receive a fee not exceeding ten shillings, or such part thereof, not being less than three shillings as the inspector of the district may consider a reasonable remuneration to the surgeon for his trouble, which fee shall be paid as other expenses incurred under this act.

24. And be it enacted, that one of her Majesty's principal Secretaries of State, on the report and recommendation of an inspector, may empower such inspector to direct one or more actions to be brought in the name and on behalf of any person who shall be reported by such inspector to have received any bodily injury from the machinery of any factory, for the recovery of damages for and on behalf of such person.

25. And be it enacted, that any damages which shall be recovered in any action so directed to be brought shall be paid, as soon after they are received as conveniently may be, to the person in whose behalf they have been recovered, or shall be otherwise settled for the use and benefit of the said person in such manner as shall be approved of by the Secretary of State; and in case a verdict shall be found for the defendant, or judgment shall be recovered against the plaintiff, or the plaintiff shall be nonsuited, the defendant shall have the like remedies for his costs against the inspector as he might have had against the plaintiff; and all charges and expenses incurred in bringing any such action, beyond what are recovered from the defendant, and not otherwise provided for, shall be paid as other expenses incurred under this act are to be paid.

26. And be it enacted, that the hours of the work of children and young persons in every factory shall be reckoned from the time when any child or young person shall first begin to work in the morning in such factory,(*y*) and shall be regulated by a public clock, or by some other clock open to the public view, to be approved of in either case in writing under the hand of the inspector or sub-inspector of the district.

[*473] 27. And be it enacted, that registers shall be kept in the *factory to which they relate, by the ocupier of every factory, according to the forms and directions given in Schedule (B.) to this act annexed; and every inspector shall have power to require such occupier to send to him, in such manner as may be directed in the requi-

(*y*) See further 10 & 11 Vict. c. 29; 13 & 14 Vict. c. 54, post.

sition, any extracts from such registers, and any other information with relation to the persons employed in the factory, which may be requisite to facilitate the performance of the duties of such inspector in any inquiry made under the authority of the Factory Act or of this act; but no information so sent by the occupier of any factory which is not contained in the registers, certificates, and other documents required by this act to be received or kept shall be admissible in evidence in any proceeding against him for the recovery of any penalty; and the registers, certificates, and other documents required by this act to be received or kept shall be forthwith produced to the inspector or sub-inspector on his demanding to examine the same at any time when the factory is at work.

28. And be it enacted that it shall not be necessary to hang up in any mill or factory any copy of any abstract of the Factory Act, or of any regulations made in pursuance of the said act, other than is hereinafter provided; and that such abstract of the Factory Act as amended by this act as shall be directed by one of her majesty's principal secretaries of state shall be fixed on a movable board, and be hung up as soon as received by the occupier of the factory or his agent in the entrance of the factory, and in such other places as the inspector or sub-inspector of the district may direct; and notices of the names and addresses of the inspector and sub-inspector of the district in which the factory is situated, of the name and address of the surgeon who grants certificates of age for the factory, of the clock by which the hours of work in the factory are regulated, of the times of beginning and ending daily work of all persons employed in the factory, and any alteration thereof, of the times of the day and amount of time allowed for their several meals, of all time lost which is intended to be recovered, and of all time which shall be recovered, together with every other notice required by this act, written or printed in legible characters, and fixed on movable boards, (each particular notice being signed by the occupier of every factory or his agent,) shall be hung up in the entrance of the factory, where they may be easily read by the persons employed in the factory, and in such other places as the inspector or sub-inspector of the district may direct, and whence they shall not be removed while the factory is at work; and in case any such abstract of the Factory Act as amended by this act, or notice, shall become illegible in any part, the occupier of the factory shall cause a new copy thereof to be provided and hung up as aforesaid; but the notice of lost time need not remain after the whole of the lost time intended to be recovered shall have been recovered; and every notice required to be hung up shall be in the forms *and according to the directions given in the schedule (C.) hereunto annexed.(z) [*474]

29. And be it enacted, that every child who shall have completed his eighth year, and shall have obtained the surgical certificate required by this act of having completed his eighth year, may be employed in a factory in the same manner and under the same regulations as children who have completed their ninth year; but no child under eight years of age shall be employed in any factory.

30. And be it enacted, that no child shall be employed in any factory

(z) See Ryder v. Mills, 3 Exc. 853; but see now 13 & 14 Vict. c. 54, s. 2.

more than six hours and thirty minutes in any one day, save as hereinafter excepted, unless the dinner time of the young persons in such factory shall begin at one of the clock, in which case children beginning to work in the morning may work seven hours in one day; and no child who shall have been employed in a factory before noon of any day shall be employed in the same or any other factory, either for the purpose of recovering lost time or otherwise, after one of the clock in the afternoon of the same day, save in the cases when children may work on alternate days, or in silk factories more than seven hours in any one day, as hereinafter provided.(*a*)

31. And be it enacted, that in any factory in which the labour of young persons is restricted to ten hours in any one day it shall be lawful to employ any child ten hours in any one day on three alternate days of every week, provided that such child shall not be employed in any manner in the same or any other factory on two successive days, nor after half past four of the clock in the afternoon of any Saturday: provided always, that the parent or person having direct benefit from the wages of any child so employed shall cause such child to attend some school for at least five hours between the hours of eight of the clock in the morning and six of the clock in the afternoon of the same day on each week day preceding each day of employment in the factory, unless such preceding day shall be a Saturday, when no school attendance of such child shall be required: provided also, that on Monday in every week after that in which such child began to work in the factory, or any other day appointed for that purpose by the inspector of the district, the occupier of the factory shall obtain a certificate from a schoolmaster, according to the form and directions given in the schedule (A.) to this act annexed, that such child has attended school as required by this act; but it shall not be lawful to employ any child in a factory more than seven hours in any one day, until the owner of the factory shall have sent a notice in writing to the in-
[*475] spector of the district of his intention *to restrict the hours of labour of young persons in the factory to ten hours a day, and to employ children ten hours a day; and if such occupier of a factory shall at any time cease so to employ children ten hours a day he shall not again employ any child in his factory more than seven hours in any one day until he shall have sent a further notice to the inspector in the manner hereinbefore provided.

32. And be it enacted, that no female above the age of eighteen years shall be employed in any factory save for the same time and in the same manner as young persons may be employed in factories;(*b*) and that any person who shall be convicted of employing a female above the age of eighteen years for any longer time or in any other manner shall for every such offence be adjudged to pay the same penalty as is provided in the like case for employing a young person contrary to law: provided always, that nothing herein or in the Factory Act contained as to certificates of age shall be taken to apply to females above the age of eighteen years.

33. And be it enacted, that no time lost by accident or otherwise in

(*a*) Ryder v. Mills, 3 Exc. 853; and infra, note (*b*).
(*b*) See further, 10 & 11 Vict. c. 29; 13 & 14 Vict. c. 54, post.

any factory shall be made good or worked up by extension of ordinary hours of labour, save as is hereinafter provided; and that in any factory in which any part of the machinery is moved by the power of water the time which shall have been lost by stoppages from want of water, or from too much water, may be recovered in manner following, within six months next after the stoppage, between the hours specified in the Factory Act as those within which time lost by drought or excess of water may be recovered; and in order to recover time so lost any child or young person may be employed one hour in each day more than the time to which the ordinary daily labour of children and young persons respectively is restricted by law, except on Saturday; but it shall not be lawful so to recover any lost time until a notice shall have been sent by post to the sub-inspector of the district in which the factory is situated, stating the intention so to recover time that has been lost, nor unless a notice according to the form and directions given in the schedule (C.) to this act annexed shall have been previously fixed up in the entrance of the factory, and in such other places as an inspector or sub-inspector may direct; and such notice shall be kept so fixed up during the whole time while the lost time is in course of being recovered; and such notice shall be kept in a book as directed in the said schedule (C.); nor shall lost time be so recovered on two successive days, unless the amount of time recovered on any one day shall be inserted before nine of the clock in the morning of the following day in the last mentioned notice.

34. And be it enacted, that in any factory in which any part *of the machinery is moved by the power of water, when the stream [*476] is so diminished by drought or swollen by flood during any part of the day that any part of the manufacturing machinery driven by the water-wheel has been stopped by reason of such drought or flood, the young persons who would have been employed at such machinery may recover such lost time during the night next following the said day, unless the said day be Saturday: provided always, that no such young person shall be employed during any twenty-four consecutive hours for a greater number of hours than that to which the ordinary daily labour of such young persons in factories is otherwise restricted by law; and that no young person so employed in the night shall work more than five hours, without an entire cessation from work of at least thirty minutes; but it shall not be lawful to recover any such lost time unless a notice according to the form and directions given in the schedule (C.) to this act annexed shall have been previously fixed up in the entrance of the factory, and in such other places as an inspector or sub-inspector may direct, and unless such notice be kept so fixed up during the whole time while the lost time is in course of being recovered; and such notice shall be kept in a book as directed in the said schedule (C.) (c.)

35. And be it enacted, that no child or young person shall be employed in a factory, either to recover lost time or for any other purpose, on any Saturday after half past four of the clock in the afternoon.

36. And be it enacted, that the times allowed for meal times as pro-

(c) See 13 & 14 Vict. c. 54, s. 5, post.

vided by the Factory Act shall be taken between the hours of half past seven in the morning and half past seven in the evening of every day, and one hour thereof at the least shall be given, either the whole at one time or at different times, before three of the clock in the afternoon; and no child or young person shall be employed more than five hours before one of the clock in the afternoon of any day without an interval for meal time of at least thirty minutes; and during any meal time which shall form any part of the hour and a half allowed for meals no child or young person shall be employed or allowed to remain in any room in which any manufacturing process is then carried on; and all the young persons employed in a factory shall have the time for meals at the same period of the day, unless some alteration for special cause shall be allowed in writing by an inspector.(*d*)

37. And be it enacted that each of the half holidays required by the Factory Act to be given shall comprise not less than one half of the day, [*477] and during such time no young person shall be *employed in the factory; and that at least four of such half holidays shall be given between the fifteenth day of March and the first day of October in each year to every young person who shall be employed in the factory during the whole of such period; but no cessation from work shall be deemed a half holiday, unless notice of such half holiday, and of the time of such cessation from work, shall have been fixed up on the preceding day in the entrance of the factory, and in any other place that the inspector or sub-inspector may direct; and that in addition to such eight half days no child or young person shall be allowed to work in any factory on Christmas Day or Good Friday, in England or Ireland; and in Scotland no child or young person shall be allowed to work on any day the whole of which is set apart by the Church of Scotland for the observance of the sacramental fast in the parish in which the factory is situated.

38. And be it enacted, that save as herein otherwise provided, the parent or person having any direct benefit from the wages of any child employed in a factory shall cause such child to attend some school on the day after the first employment of such child, and thenceforth on each working day of every week during any part of which the said child shall continue in such employment; so that on every such day, except in the cases hereinafter provided, such child shall attend school during at least three hours after the hour of eight of the clock in the morning and before the hour of six of the clock in the evening; provided, always, that any child attending school after one of the clock in the afternoon shall not be required to remain in school more than two hours and a half on any one day between the first day of November and the last day of February, and no child shall be required to attend school on any Saturday, and the non-attendance of every such child shall be excused on every day on which such child shall be certified by the schoolmaster to have been prevented by sickness or other unavoidable cause from attending the school, and during any holiday or half holiday authorized by this act, or by con-

(*d*) Ryder v. Mills, 3 Exc. 853; 13 & 14 Vict. c. 54, post.

sent in writing of the inspector of the district in which the factory is situated, or where the school-room is situated within the outer boundary of the factory at which such child is employed, on every day on which the school shall be closed in consequence of the said factory ceasing to be at work during the whole day.

39. And be it enacted that no schoolmaster's tickets or vouchers shall be required or valid other than is hereinafter provided, and that the occupier of every factory in which a child is employed shall on Monday in every week after the first week in which such child began to work in the factory, or on any other day appointed for that purpose by an inspector, obtain a certificate from a schoolmaster, according to the form and directions given in the schedule (A.) to this act annexed, that such child has attended school as required by this act during the foregoing week; and such occupier shall keep such certificate for six *months after the date thereof, and shall produce the same to any inspector or sub-inspector when required during such period, and shall, when required by the inspector for the district, pay to the schoolmaster of such child, or to such other person as the said inspector may direct, towards the expenses of educating such child, such sum as the inspector may require, not exceeding two-pence per week, and shall be entitled to deduct from the wages payable to such child any such sum as he shall have been required to pay for such expenses, not exceeding the rate of one-twentieth part of the weekly wages of such child: provided always, that if an inspector, on his personal examination, or on the report of a sub-inspector, shall be of opinion that any school-master who grants certificates of the school attendance of children employed in a factory is unfit to instruct children, by reason of his incapacity to teach them to read and write, from his gross ignorance, or from his not having the books and materials necessary to teach them reading and writing, or because of his immoral conduct, or of his continued neglect to fill up and sign the certificates of school attendance required by this act, the inspector of the district may annul any certificate granted by such disqualified schoolmaster, by a notice in writing addressed to the occupier of the factory in which the children named in the certificate are employed, or his principal agent, setting forth the grounds on which he deems such schoolmaster to be unfit; and after the date of such notice no certificate of school attendance granted by such schoolmaster shall be valid for the purposes of this act, unless with the consent in writing of the inspector of the district; but no inspector shall annul any such certificate unless in the aforesaid notice he shall name some other school situated within two miles of the factory where the children named in the certificate are employed: provided also, that any schoolmaster whose certificate shall have been annulled, or the occupier of the factory in which the children named in the certificate are employed on behalf of the schoolmaster, may appeal to the secretary of state against such decisions of the inspector, and the secretary of state may, if he think fit, rescind such decision: provided also, that every inspector shall in his annual report to the secretary of state for the home department state the instances (if any) in which he shall have had occasion to annul any such

[*478]

certificate, together with the reasons which he has in each case assigned for so doing.

40. And be it enacted, that so much of the Factory Act as limits the time for preferring complaints for offences against the said act, and as requires any written notice to be given of the intention to prefer any complaint for such offence, and as fixes any penalty or punishment for offences against the said act, and as relates to the procedure for convicting any person of any offence against the said act, and for levying or inflicting the penalty or punishment imposed, and for appealing against any such conviction, and as specifies the circumstances under which when [*479] *any penalties and punishments shall not be levied or inflicted, and as relates to the application of penalties, shall be repealed.

41. And be it enacted, that the occupier of any factory in which any offence against this act has been proved to have been committed, and for which a pecuniary penalty may be imposed, shall in every case (save as hereinafter provided) be deemed in the first instance to have committed the offence, and shall be liable to pay the penalty: but any occupier who shall have been proceeded against by any inspector or sub-inspector shall be entitled, upon complaint or information duly made by such occupier, to have any agent, servant, or workman whom he shall charge as the actual offender brought by summons before the justices at the time appointed for hearing the complaint made against him by the inspector or sub-inspector; and if after the commission of the offence has been proved the occupier of the factory shall prove, to the satisfaction of the justices, that he had used due diligence to enforce the execution of the act, and that the said agent, servant, or workman had committed the offence in question without his knowledge, consent or connivance, the said agent, servant, or workman, shall be convicted of such offence, and shall pay the penalty instead of the occupier of the factory; and the payment of such penalty and costs shall be enforced against the agent, servant, or workman in like manner as penalties are made recoverable by this act: provided always, that when it shall be made to appear to the satisfaction of the inspector or sub-inspector, at the time of discovering the offence, that the occupier of the factory had used all due diligence to enforce the execution of this act, and also by what person such offence had been committed, and also that it had been committed without the personal consent, connivance, or knowledge of the occupier, and in contravention of his orders, then the inspector or sub-inspector shall proceed against the person whom he shall believe to be the actual offender in the first instance, without first proceeding against the occupier of the factory.

42. And be it enacted, that notice in writing of an intention to prefer a complaint that a child or young person had been employed in a factory in which sufficient means had not been employed or continued for protecting the workers from being wetted, or for preventing the escape of steam into the room ocupied by the workers, or that any part of the aforesaid machinery, hoist or teagle, or wheel-race has not been securely fenced, shall be given four days at least previous to the day fixed for hearing the complaint; and if the party complained against intend to bring forward any millwright or other person skilled in the construction

of the aforesaid machinery as a witness at the hearing of the case, he shall give notice in writing of such intention to the inspector or sub-inspector who shall be the complainant forty-eight hours previous to the day fixed for hearing the case.

*43. And be it enacted, that if any inspector or sub-inspector shall observe in a factory any part of the machinery of any kind [*480] or description or any driving strap or band, not securely fenced, which he shall deem likely to cause bodily injury to any person employed in such factory, he shall give notice in writing to the occupier of such factory or his agent of such part of the machinery, or such strap or band, as he shall deem to be dangerous, according to the form and directions given in Schedule (D.) to this act annexed; and the occupier of the factory, or his agent shall sign a duplicate copy of such notice in acknowledgement of his having received it: provided always, that upon an application in writing made upon the occupier of the factory, within fourteen days after he shall have received such notice, two arbitrators skilled in the construction of the kind of machinery to which such notice refers shall be appointed, one of whom shall be named by the occupier of the factory in the aforesaid application, and the other by the inspector of the district, with the least possible delay after he shall have received such application; and the said arbitrators shall proceed to examine the machinery alleged to be dangerous within fourteen days of appointment of the arbitrator named by the inspector; and if the arbitrators so appointed shall not agree in opinion the said arbitrators shall choose a third arbitrator possessing a similar knowledge of machinery; and if the said arbitrators, or any two of them, shall sign an opinion in writing addressed to the inspector of the district, that it is unnecessary or impossible to fence the machinery, or strap or band, alleged in the notice to be dangerous, the inspector of the district on receipt of the same shall cancel the said notice; and the decision of the said arbitrators shall be that it is unnecessary or impossible to fence the machinery so alleged to be dangerous, the expense of such reference shall be paid as other expenses under this act, but if the decision of the arbitrators shall be that it is necessary and possible to fence the said machinery, then the expenses of the reference shall be paid by the occupier of the factory, and shall be recoverable as the penalties under this act are recoverable.

44. And be it enacted, that all complaints for offences against this act shall be preferred within two months next after the commission of the offence, except in the case of complaints for offences punishable at discretion by fine or imprisonment, or for working on Christmas Day, Good Friday or the Sacramental Fast Days, or for not giving all or any of the eight half days for holidays required to be given, in each of which cases the complaints may be preferred within three months next after the commission of the offence; and no person shall be liable to a larger amount of penalties, for any repetition from day to day of the same kind of offence than the highest penalty hereinafter named for such offence, unless such repetition of offence shall have been committed after a complaint shall have been made *for the previous offence, and except [*481]

also for offences of employing two or more children or young persons contrary to law.

45. And be it enacted, that all complaints for the enforcement of any penalty under this act shall be heard and determined by two or more justices of the peace acting for the county or other jurisdiction wherein the offence was committed, or for any adjoining county or jurisdiction, with the like authority as though the complaint had arisen within such adjoining county or jurisdiction, provided that the place of hearing the complaint in such other county or jurisdiction be not more than five miles from the place where the offence was committed; and the justices by whom any person shall be fined for any offence against this act may order that such person shall pay the penalty, and also the reasonable costs and charges of such proceedings and conviction, either immediately or within such time as the said justices shall think fit; and in default of payment thereof any justices may cause the same to be levied by distress and sale of the goods and chattels of the party convicted, together with the reasonable costs and charges of such conviction, distress and sale, by warrant under the hand and seal of any such justice; and where the warrant of distress is directed against the goods and chattels of any person being the occupier of a factory it shall be lawful under such warrant to distrain any goods and chattels found in the said factory which would be liable to be distrained for rent in arrear.

46. And be it enacted, that in England and Ireland a summons for an offence against this act shall be issued by any justice, upon complaint being made to him in writing by an inspector or sub-inspector, or upon oath before him by any other person, that to the best of the knowledge and belief of the inspector, sub-inspector, or such other person such an offence has been committed, and in Scotland a summons for an offence against this act shall be issued by any justice upon complaint being made to him in writing by an inspector or sub-inspector, or by the procurator fiscal, or by any person having a title and interest to prosecute with the concurrence of the prosecutor fiscal, that to the best of the knowledge and belief of such inspector, sub-inspector, procurator fiscal, or other person such an offence has been committed; and in every such prosecution in Scotland the proceedings shall be summary, and it shall not be necessary to take down in writing more than the substance of the evidence; and no higher or other fees shall be allowed in Scotland to the clerk of court or constables than are allowed to be paid to the sheriff clerk and sheriff officers in causes and prosecutions under the authority of an act passed in the tenth year of the reign of king George the Fourth, intituled "An act for the more effectual Recovery of Small Debts, and for diminishing the Expenses of Litigation in causes of small Amount in the Sheriff Courts in Scotland."

47. And be it enacted, that every person who shall be summoned [*482] *to answer any complaint shall be bound to appear at the time(e) and place mentioned in the summons, and to produce before the

(e) Where the proceedings are taken under sect. 47, the *time* is in the discretion of the justices; but semble, that under sect. 50, the summons must be served twenty-four

justices then and there present every register or other account, paper, or notice required by law to be kept by him or his agent, which shall be mentioned in the summons; and if he shall not appear accordingly(*f*) then (upon proof of due service of the summons) the justices may either hear and determine the case in his absence, or issue their warrant, as hereinafter provided, for enforcing his attendance, and the attendance of any witness who shall refuse or neglect to appear.

48. And be it declared and enacted, that it shall be no objection to the competency of any inspector or sub-inspector to give evidence as a witness in any prosecution under this act that it is brought at the instance of such inspector or sub-inspector.

49. And be it enacted that any justice of the peace, upon any complaint under this act, may summon any witness to appear and give evidence at a time and place appointed for hearing such complaint, and by warrant under his hand and seal may require any person to be brought before the justices by whom the complaint shall be heard who shall neglect or refuse to appear at the time and place appointed in any summons, proof upon oath being first given of personal service of the summons upon the person against whom such warrant shall be granted, and may commit any person coming or brought before such justices who shall refuse to give evidence to the county prison or prison of the place where such offence was committed, there to remain for any time not exceeding one month, or until such person shall sooner submit himself to be examined; and in case of such submission the order of any justice shall be a sufficient warrant to any gaoler or prison keeper for the discharge of such person.

50. And be it enacted, that every inspector and sub-inspector shall be empowered to summon(*e*) any person whom he shall *charge with [*483] having offended against this act, and also all witnesses who may be needed to give evidence concerning the charge; and every such summons shall be of the same effect as if issued by a justice of the peace after complaint upon oath before him, and shall be enforced in like manner, and the like proceedings may be had thereupon, as if complaint upon oath had been made before such justice for such offence; and every constable and other peace officer to whom any such summons shall be directed shall be bound to take charge of and to serve such summons, and in default thereof shall be liable to be punished as if the summons had been issued by a justice of the peace; and every such summons of an offender or witness may be in the form provided in each case, and given in the schedule (D.) hereunto annexed; and when an inspector or sub-inspector shall summon an offender he shall give to the same constable or peace officer a statement of the offence alleged to have been committed, who shall

hours before the time at which the party is to appear; Ex parte Hopwood, 15 Q. B. 121. See further, infra, note to sect. 69. In Exparte Williams 2 L. M. & P. 580, it was held that under 11 & 12 Vict. c. 43, s. 2, which authorizes justices to proceed ex parte where it is proved on oath before them that the summons has been served upon the defendant "a reasonable time" before the hearing, it was for *the justices* to decide whether the time was reasonable under the circumstances, and that having so decided the court would not review their decision. (*e*) Ibid.

(*f*) See Ex parte Hopwood, ubi supra, where defendant appeared by attorney only authorized to request an adjournment.

deliver it to a justice of the peace usually acting for the division in which the case is to be heard, or to the clerk of any such justice, at least twenty-four hours before the period named in the summons for the appearance of the party charged with such offence.

51. And be it enacted, that it shall be sufficient, in any information, complaint, or other proceeding under this act, to set forth the name of the ostensible occupier or title of the firm by which the occupier employing the workpeople of the factory may be usually known; and the service of any summons, order, or notice required by this act, or issued under the authority of this act, and not expressly directed to be personal service, may be made by leaving the same at the dwelling-house of the person to whom the same shall be addressed, or, in the case of summoning or giving an order or notice to the occupier of a factory or to a schoolmaster, by giving a copy thereof in writing to the agent of such occupier, or by sending a copy thereof by the post directed to the occupier of the factory at the factory, or to the school master at his school.

52. And be it enacted, that in any complaint of the employment of any person in a factory otherwise than is allowed by this act the time of beginning work in the morning which shall be stated in any notice fixed up in the factory, signed by the occupier or his agent, shall be taken to be the time when all persons in the factory, except children beginning to work in the afternoon, began to work on any day subsequent to the date of such notice, so long as the same continued fixed up in the factory; and if any person shall be allowed to enter or be in any factory, except at meal time, or during the stoppage of the whole machinery of the factory, or for the sole purpose of bringing tea or other articles of food to the workers in a factory, between the hours of four and five of the clock in the afternoon, it shall be evidence, unless the contrary shall be proved, that such person was then employed in that factory; but yards, playgrounds, and *places open to the public view, schoolrooms, wait- [*484] ing rooms, and other rooms belonging to the factory, in which no machinery is used or manufacturing process carried on, shall not be taken to be any part of the factory, with reference to this enactment.(*f*)

53. And be it enacted, that every surgical certificate given under this act, or which has been granted conformably to the Factory Act, and which shall not have been annulled, shall be evidence in the first instance of the age of the person named therein, but shall not protect any person, knowing such person to be of less than the age certified, from any penalty for employing or conniving at the employment of such person otherwise than is allowed by this act; and in every proceeding on any information or complaint for employing any person contrary to this act a declaration in writing by the certifying surgeon of the district that he has personally examined such person, and believes him to be under such age as shall be set forth in such declaration, shall be evidence, in the first instance, until the contrary shall be made to appear, that such person is under the age mentioned in such declaration.

54. And be it enacted, that if any inspector or sub-inspector shall make a complaint before a justice of the peace that the real age of any

(*f*) See further, 13 & 14 Vict. c. 54, post.

person who is employed in a factory without a surgical certificate is less than sixteen, the occupier of the factory in which such person is employed shall be liable to the penalties for employing persons for whom a surgical certificate is required by law without the proper surgical certificate, unless, upon the proceeding for the enforcement of such penalties, he shall prove, by an extract from a legal register of birth or baptism, that the said person had completed his sixteenth year of age.

55. And be it enacted, that if an inspector or sub-inspector shall make a complaint before a justice of the peace that the real age of any person employed in a factory in a manner contrary to law is less than eighteen, the occupier of the factory in which such person is employed shall, save in the cases hereinafter excepted, be liable to the penalty for employing such person, unless upon the proceeding for the enforcement of such penalties he shall prove that the said person had completed his eighteenth year.

56. And be it enacted, that any person who shall be convicted of having employed any person in any manner contrary to the provisions of the Factory Act as amended by this act, or for employing a child without having obtained a certificate from a schoolmaster where such certificate is required by law, such person not being the parent nor having any direct benefit from the wages of such child, shall for every such offence be adjudged *to pay a penalty of not less than twenty shillings and not more than three pounds for each child or younger person so [*485] illegally employed: provided always, that if it shall be proved that such offence was committed during the night the penalty shall not be less than forty shillings nor more than five pounds.

57. And be it enacted, that the parent and every one having any direct benefit from the wages of any child or young person employed in any manner forbiden by the Factory Act as amended by this act, who shall neglect to cause such child to attend school as hereinbefore provided, shall be liable to a penalty of not less than five shillings and not more than twenty shillings for each offence, unless it shall appear to the justices before whom the complaint is preferred that such offence has been committed without the consent, connivance, or wilful default of such parent or person so benefited.

58. And be it enacted, that the penalty for not limewashing the walls, passages, staircases, and ceilings or tops of rooms of a factory, within the period prescribed by this act, or for not washing, as hereinbefore provided, the inside walls and ceilings or tops of rooms which are painted with oil, shall not be less than three nor more than ten pounds, and not less than two pounds additional penalty for every month during which the occupier shall allow any of the said walls, passages, staircases or ceilings or tops of rooms to remain without being limewashed or washed as aforesaid, after being convicted of this offence.

59. And be it enacted, that the penalty for not fencing the several parts of the machinery, hoist, or teagle, and wheel-race, required by this act to be fenced, shall be not less than five pounds and not more than twenty pounds.

60. And be it enacted, that if any person shall suffer any bodily in-

jury in consequence of the occupier of a factory having neglected to fence any part of the machinery, or any hoist or teagle, or any wheel-race required by this act to be securely fenced, or having neglected to fence any part of the machinery, or any driving strap or band, in the factory, of which he shall have received notice in writing from an inspector or sub-inspector as hereinbefore provided, that the same was deemed to be dangerous, the occupier of such factory shall pay a penalty not less than ten pounds and not more than one hundred pounds; and the whole or any part of such penalty may be applied for the benefit of the injured person, or otherwise as the Secretary of State shall determine; and so much of such penalty as shall not be applied as aforesaid shall be applied as other penalties under this act: provided always, that the occupier of the factory shall not be liable to any such penalty if the notice which he shall have received from an inspector or sub-inspector shall have been cancelled as hereinbefore provided, or that in any proceeding against an occupier of a factory for not securely fencing that part of the machinery, hoist, teagle, [*486] or *wheel race by which such bodily injury was inflicted the complaint shall have been heard and dismissed previous to the time when such bodily injury was inflicted.

61. And be it enacted, that every person convicted of wilfully obstructing an inspector or sub-inspector in the execution of any of the powers intrusted to him by the Factory Act as amended by this act shall be liable for each offence to a penalty not less than three pounds and not more than ten pounds.

62. And be it enacted, that every occupier of a factory in which an inspector or sub-inspector shall be obstructed in the night by any attempt to prevent his making a full and complete examination of all parts of the factory, and of every person employed therein, shall be liable to a penalty of not less than twenty pounds and not more than fifty pounds.

63. And be it enacted, that every person convicted of making, giving, signing, countersigning, counterfeiting or making use of any certificate authorized or required by the Factory Act or by this act, knowing the same to be untrue, or of wilfully making or wilfully conniving at the making any false or counterfeited certificate, or any false entry in any register, or any other account, paper, or notice required by this act, and also every person convicted of wilfully making and signing a false declaration on any proceedings under this act, shall be liable to a penalty not less than five pounds and not more than twenty pounds, or to be imprisoned for any time not more than six months in the house of correction in the county, town, or place where the offence was committed.

64. And be it enacted, that the penalty for any offence against the Factory Act as amended by this act, for which no specific penalty is hereinbefore provided, shall be any sum not less than two pounds and not more than five pounds.

65. And be it enacted, that every person who shall be convicted twice within twelve months for an offence of the same kind against the Factory Act as amended by this act shall pay for his second offence any sum not less than one half of the highest penalty for that offence, and if convicted three times within twelve months for an offence of the same kind he shall

pay not les than two-thirds of the highest penalty, and if convicted more than three times within twenty-four months for an offence of the same kind he shall pay the highest penalty; but a repetition of the same kind of offence shall not be considered as the second or subsequent offences referred to in this enactment, unless such second or subsequent offence shall have been committed after a complaint has been made for the previous offences; and in any case in which a person shall be convicted at any one time for offences against the Factory Act as amended by this act, so that the penalties amount in the whole to more than one hundred pounds, the sum of one hundred pounds, together with all the reasonable costs and charges of such *proceedings and convictions, may be paid instead of the penalties for all the offences committed by him before [*487] the day on which the last summons was taken out against him.

66. And be it enacted, that all penalties for any offence against the Factory Act which shall not have been otherwise appropriated at the time when this act shall come into force, and every penalty imposed under this act, shall be applied under the direction of one of her Majesty's principal Secretaries of State, and shall be paid, on account of the inspector for the district in which the penalty was imposed, to such banker as shall be appointed by such inspector to receive the same; and every person to whom any such penalty shall be paid shall pay over the amount thereof to the banker so appointed within fourteen days of receiving the same; and it shall be lawful for the Secretary of State to remit the whole or any part of such penalty; and so much thereof as shall not be so remitted, and not otherwise especially appropriated by this act, shall be applied by such inspector, under the direction of one of her Majesty's principal Secretaries of State, in such manner as shall appear best for the establishment or support of day schools for the education of children employed in factories; and so much of an act passed in the sixth year of the reign of his late Majesty, intituled "An Act to provide for the Regulation of Corporations in England and Wales," as provides that certain penalties and forfeitures, if recovered before any justice of any borough having a separate court of quarter sessions of the peace, shall be recovered for and adjudged to be paid to the treasurer of such borough, shall be repealed as to the penalties imposed under this act.

67. And be it enacted, that whenever any person shall be convicted of any offence against the Factory Act as amended by this act the clerk of the peace where such conviction shall have been filed shall, upon the request in writing of any inspector or sub-inspector deliver or cause to be delivered to him a copy of the conviction, certified under his hand to be a true copy; and every such copy shall be received as evidence of such conviction upon any future proceeding under this act; and for every such copy the clerk shall be entitled to have a fee of one shilling, and no more.

68. And be it enacted, that every conviction under this act may be in the form given in the Schedule (D.) to this act annexed, or in any other form more suitable to the case, and shall be certified in England and Ireland to the next general or quarter sessions of the peace, and in Scot-

land to the clerk of the justices of the peace, there to be filed amongst the records of the county, riding, division, stewartry, town, or place.

69. And be it enacted, that no appeal shall be allowed against any conviction under this act, except for any offence punishable at discretion by fine or imprisonment, or when the penalty awarded shall be more than three pounds; neither shall any conviction as aforesaid, be removable [*488] by certiorari(g) *or bill of advocation into any court whatever; and no information, conviction, or other proceeding on any complaint for any offence against this act shall be quashed or deemed illegal for matter of form, or for the want of any averment unnecessary to be proved, or the omission of any word, or for the insertion of any word, in any case in which such omission or such insertion respectively do not affect the essence of the offence, nor for the wrong designation of a name, or time, or place, where the person, time, and place intended shall have been so stated as to have been, in the opinion of the justices by whom the complaint shall have been heard, clearly understood by the person charged with such offence; and it shall not be necessary, in any information, conviction, or other proceeding under this act, to define the processes carried on in such factory, or nature of the power by which the machinery of such factory is moved, or to set out that the factory or process of employment referred to is not within any of the cases excepted, provided that it be therein stated that such factory is a factory within this act; and the proof of being within any such excepted case shall lie upon the party claiming the benefit of such exception.

70. And be it enacted, that any person aggrieved by any such conviction for which an appeal is allowed by this act may appeal to the next court of general or quarter sessions which shall be holden not less than twelve days after the day of the conviction for the county or other jurisdiction wherein the cause of complaint shall have arisen; provided that the person so intending to appeal shall give to the inspector or sub-inspector of the district notice in writing of such appeal, and of the cause or matter thereof, within three days after the conviction or order, and seven clear days at least before such session, and shall also enter into a recognizance, with two sufficient sureties, before a justice of the peace for the county or other jurisdiction, seven clear days at the least before such session, conditioned personally to appear at the said session, and to try such appeal, and to abide the judgment of the court thereon, and to pay such costs as shall be by the court awarded; and the court at such session shall hear and determine the matter of appeal, and shall make such order thereon as to the court shall seem meet; and in case of the dismissal of [*489] the appeal or the affirmance of the *conviction or order the court shall adjudge and order the party to be punished according

(g) A conviction cannot be removed by certiorari, merely on a suggestion that the party was convicted on summons of justices under sect. 47, giving unreasonably short notice, and in the absence of himself or any one appearing on his behalf, except an attorney authorized only to apply for an adjournment, and that the conviction took place without proof of service of summons, and without any evidence of the facts charged; such objections not going to the jurisdiction; Ex parte Hopwood, 15 Q. B. 121.

to the conviction or to obey the order appealed against, and to pay such costs as shall be awarded, and shall, if necessary, issue process for enforcing such judgment.

71. And be it enacted, in all cases in which a justice of the peace is required or empowered to do any thing under the Factory Act as amended by this act, or is named therein, a burgh magistrate shall have within his jurisdiction the same powers and duties as are herein given to such justice, and shall exercise the same in Scotland; but no complaint preferred for any offence against this act committed in a factory shall be heard by a justice of the peace or burgh magistrate, being an occupier of the factory, or being the father, son, or brother of the occupier of the factory in which the offence set forth in the complaint shall have been committed.

72. Provided always, and be it enacted, that any child above eleven years of age employed solely in the winding and throwing of raw silk, and who shall have obtained the surgical certificate required by this act of his having completed his eleventh year, may work, without any proof of having attended a school, for any time not exceeding ten hours on any working day, but not after half past four of the clock of the afternoon of any Saturday.(*h*)

73. And be it enacted, that the Factory Act as amended by this act, and this act, shall be construed together as one act, and that so much of the Factory Act, and of any rule or regulation heretofore made by any inspector, as is inconsistent with this act, shall be taken to be repealed; and that in this act, unless another sense shall be plainly shown by the context, or by some positive enactment to the contrary, the word "child" shall be taken to mean a child under the age of thirteen years; and the words "young person" shall be taken to mean a person of the age of thirteen years and under the age of eighteen years; and the word "parent" shall be taken to mean parent, guardian, or person having the legal custody of any such child or young person; and any person who shall work in any factory, whether for wages or not, or as a learner or otherwise, either in any manufacturing process, or in any labour incident to any manufacturing process, or in cleaning any part of the factory, or in cleaning or oiling any part of the machinery, or in any other kind of work whatsoever, save in the cases hereinafter excepted, shall be deemed notwithstanding any other description, limitation, or exception of employment in the Factory Act, to be employed therein within the meaning of this act; and the words "inspector" and "sub-inspector" shall be taken to mean respectively an inspector and a sub-inspector of factories; and the *word "agent" shall be taken to mean any person having on behalf of the occupier of any factory the care or direction thereof or of any part thereof, or of any person employed therein; and the word "month" shall be taken to mean a calendar month; and the words "mill gearing" shall be taken to comprehend every shaft, whether upright, oblique, or horizontal, and every wheel, drum, or pulley by which the motion of the first moving power is communicated to any [*490]

(*h*) Repealed 13 & 14 Vict. c. 54, s. 7, post.

machine appertaining to the manufacturing process; and the word "factory," notwithstanding any provision or exemption in the Factory Act, shall be taken to mean all buildings and premises situated within any part of the United Kingdom of Great Britain and Ireland wherein or within the close or curtilage of which steam, water, or any other mechanical power shall be used to move or work any machinery employed in preparing, manufacturing, or finishing, or in any process incident to the manufacture of cotton, wool, hair, silk, flax, hemp, jute, or tow,(*i*) either separately or mixed together, or mixed with any other material or any fabric made thereof; and any room situated within the outward gate or boundary of any factory wherein children or young persons are employed in any process incident to the manufacture carried on in the factory shall be taken to be a part of the factory, although it may not contain any machinery: and any part of such factory may be taken to be a factory within the meaning of this act; but this enactment shall not extend to any part of such factory used solely for the purposes of a dwelling-house, nor to any part used solely for the manufacture of goods made entirely of any other material than those herein enumerated, nor to any factory or part of a factory used solely for the manufacture of lace, of hats, or of paper, or solely for bleaching, dyeing, printing, or calendering; and the enactments of this act respecting the hours of labour shall not apply to any young person when employed solely in packing goods in any warehouse or part of a factory not used for any manufacturing process, or for any labour incident to any manufacturing process; and nothing in this act contained shall extend to any young person, being a mechanic, artisan, or labourer, working only in making and repairing the machinery or any part of the factory.

74. And be it enacted, that this act may be amended or repealed by any act to be passed in this session of parliament.

[*491] *SCHEDULES to which this act refers.

SCHEDULE (A.)

Certificates.

[*To be written or printed on white paper.*]

Factories Regulation Act, *Victoria, c.*

No. ——, Certificate of Age for a Child to be employed in the Factory of situated at in

I, of duly appointed a certifying surgeon, do hereby certify, that son [*or* daughter] of and residing in has been personally examined by me this day one

(*i*) See 9 & 10 Vict. c. 40, ante, p. 463, note (*w*).

thousand eight hundred and and that the said child has the ordinary strength and appearance of a child of at least eight years of age, and that I believe the real age of the said child to be at least eight years; and that the said child is not incapacitated, by disease or bodily infirmity from working daily in the above-named factory for the time allowed by this act.

(Signed) Certifying Surgeon.

The form of surgical certificate to be given to a child who has obtained a certificate of real age shall be the same as above, omitting the words, "and that the said child has the ordinary strength and appearance of a child of at least eight years of age, and that I believe the real age of the said child to be at least eight years," and substituting these words in their place: "and that a certificate of the birth [*or* baptism] of the said child has been produced to me in the form required by this act, proving that the real age of such child is at least eight years."

The form of surgical certificate to be given to children employed in silk mills in proof that a child is eleven years of age shall be the same as the above, substituting the word "eleven" for the word "eight."

[*To be written or printed on coloured paper.*]

Factories Regulation Act, *Victoria, c.*

No. ——. CERTIFICATE of AGE for a YOUNG PERSON to be employed in the Factory of situated at in

I, of duly appointed a certifying surgeon do hereby certify, that son [*or* daughter] of and residing in has been personally examined *by me this day of one thousand eight hundred and and that the said [*492] young person has the ordinary strength and appearance of a young person of at least thirteen years of age, and that I believe the real age of the said young person to be at least thirteen years; and that the said young person is not incapacitated, by disease or bodily infirmity, from working daily in the above named factory for the time allowed by this act.

(Signed) Certifying Surgeon.

The form of surgical certificate to be given to a young person who has obtained a certificate of real age shall be the same as above, omitting the words "and that the said young person has the ordinary strength and appearance of a young person of at least thirteen years of age, and that I believe the age of the said young person to be at least thirteen years," and substituting these words in their place, "and that a certificate of the birth [*or* baptism] of the said young person has been produced to me in the form required in this act, proving that the real age of such young person is at least thirteen years."

The form of surgical certificate to be given in either case by any practitioner who is not a certifying surgeon must be the same as the corresponding form above given, omitting the words "duly appointed a certifying surgeon," and substituting the words "duly authorized by the university [*or* college, *or other public body having authority in that behalf*] of to practise surgery [*or* medicine]," and making the following addition which must be signed by a justice of the peace or burgh magistrate:—

The child [*or* young person] named in the above-written certificate has been this day brought before me; and the appearance of the said child [*or* young person] agrees with the description therein given; and I believe the real age of the said child [*or* young person] to be at least [*here insert the word "eight" or "eleven," in the case of a child, or "thirteen" in the case of a young person,*] years; and I declare that I have no beneficial interest in and am not the occupier of any factory, and that I am not the father, son, or brother of the occupier of any factory.

Dated this day of one thousand eight hundred and

(Signed) C. D. Justice,
[*or* Burgh magistrate].

In every surgical certificate of age the day of the month on which it shall be granted shall be written in words, and not in figures.

So soon as any certificates authorized by this act to be received as proof of the age of any person shall be obtained by the occupier of a factory or his agent, they shall be fixed in a book, to be called "The Age Certificate Book," in the order of the *dates at which they shall have [*493] been respectively received: and such certificate shall be numbered in the order in which they are so fixed in the book; but the certificates for children shall be kept in a separate and distinct place in the said book, or in a separate book, and shall be marked with a series of running numbers distinct from that of the certificates for young persons.

So soon as any certificate of age authorized by this act shall be obtained the number hereinbefore required to be set against each certificate shall be set against the name of the child or young person for whom such certificate has been granted, in the first column of the register of the persons employed required by this act to be kept in each factory. In any silk factory in which it shall be lawful to employ children above eleven years of age for ten hours a day no certificate shall be required in proof that such children have attained the age of thirteen years, so long as such persons shall not work more than ten hours in any one day.

If a surgeon shall have refused to grant a certificate of age to any child or young person, the word "refused," shall be written in the column of the register where the numbers of the certificates are required to be inserted.

Factories Regulation Act, *Victoria, c.*

CERTIFICATE REFUSED.

I, of duly appointed a certifying surgeon, do hereby declare, that son [*or* daughter] of residing in has been personally examined by me this day of one thousand eight hundred and and that in my opinion the said [child *or* young person] has not the ordinary strength and appearance [of a child of at least eight years of age (*or* of a young person of at least thirteen years of age) or (*or* and) is incapacitated by disease and bodily infirmity from working daily in a factory for the time allowed by this act.]

(Signed) Certifying Surgeon.

N. B.—The words within brackets shall be in the hand-writing of the certifying surgeon, who shall insert the reason of his refusal, to be either on account of deficient age or of bodily infirmity, or both, as the case may be.

**Factories Regulation Act,* *Victoria, c.* [*494]

SCHOOL CERTIFICATE.

I hereby certify, that the under-mentioned child [*or* children] employed in the factory of situated in has [*or* have] attended the school kept by me at for the number of hours and at the time on each day specified in the columns opposite to his [her *or* their] name [*or* names] during the week ending on Saturday the . day of one thousand eight hundred and , and that the cause of absence stated are true, to the best of my belief.

Name of Child.	Monday.		Tuesday.		Wednesday.		Thursday.		Friday.		Causes of absence.
	Time.		Time.		Time.		Time.		Time.		
	From	To	From	To	From	To	From	To	From	To	

(Signed) Schoolmaster [*or* Schoolmistress.]

the day of 18 .

Under the column headed "Time" the periods of the day that each child attends school shall be stated, as thus, from nine to twelve, or from two to five, or any other time, as the case may be; and all the children employed in the same factory who attend school before one of the clock in the afternoon shall be entered together, distinct from those who attend school after one of the clock.

The time when each child attends school shall be stated in the columns for each day, in the handwriting of the schoolmaster; and no certificate shall be valid unless the schoolmaster shall, in his own handwriting, subscribe to it his Christian and surname in full.

In the case of any child who has been absent from school, the letter (A.) shall be inserted under the day or days of absence, and the cause of absence shall be inserted in the column headed "Causes of Absence," so far as the same can be ascertained; and when any day has been a holiday at the school, the word "holiday" shall be entered in the column of the day.

[*495] All school certificates, if given on loose sheets, shall, as soon as received, be fixed in a book, to be called "The School Certificate Book," in the order of their respective dates. Copies of the above forms may be bound together in a book for each factory.

SCHEDULE (B.)

Registers.

Form for the Register of Young Persons.

List of Young Persons employed in this Factory.

No. of Reference to Age Certificate Book, as required in Schedule (A.)	NAMES.		Dates of first day of being employed or re-employed.			When any person ceases to be employed, insert opposite the name the word *Left*; and when any person completes his eighteenth year of age, the word *Eighteen*.
	Surname.	Christian Name	Month.	Day.	Year.	

This register shall contain the names of every young person employed in the factory, to be entered successively when engaged to work, whether for the first time, or, after having left, when re-engaged to work.

At the beginning of this register shall be inserted—

1. The name of the occupier or firm.

2. The name of the factory, the place, township, parish, and county where it is situated, and the post office to which the occupier desires his letters to be directed.

3. The nature of the work carried on.

*4. The nature of the moving power, the whole amount of horse power of the steam engine or water-wheel, and also the amount of horse power employed by the occupier or firm. [*496]

5. The clock by which the employment of the workers in the factory is regulated.

Every alteration in any of the above particulars shall be inserted immediately after the alteration shall have been made.

6. The holidays and half holidays which shall have been given in conformity with this act shall be recorded together in distinct place in this register.

7. The dates when the whole of the factory, if done at one time, and the several parts if done at different times, shall have been limewashed or painted in oil, and, when painted in oil, the dates of their having been washed as required by this act, and the names and residences of the persons by whom the factory was limewashed or painted in oil, shall be recorded in a distinct place in this register within six days after they have been so limewashed, painted, or washed; and this declaration of the times of limewashing, painting, and washing shall be signed by the mill occupier or his principal agent.

8. The visits of the certifying surgeon to the factory shall be recorded in this register in the manner following.

Date of visit.	Number of persons presented for examination.	Number of certificates granted.	Signature of surgeon.
	*	†	

* If the surgeon shall be told that there is no child or young person in the factory to be examined at the time of his visit, he shall insert in this column the word "None."

† If none be granted, he shall insert the word "None."

[*497] **Form for the Register of Children.*

To be kept in those factories only where children under thirteen years of age are employed.

Names of the Children employed in this Factory before Twelve o'clock at Noon, or the Morning Set

No. of reference to Age Certificate Book, as required in Schedule (A.)	NAMES.		Date of the first day of employment or re-employment.			When any child ceases to be employed, insert opposite its name the word *Left;* or if transferred to the afternoon set, the word *Changed;* or the words *Young Person,* when a child completes its thirteenth year.
	Surname.	Christian Name.	Month.	Day.	Year.	

Names of the Children employed in this Factory after One o'clock in the Afternoon, or the Afternoon Set.

No. of reference to Age Certificate Book as required in Schedule (A.)	NAMES.		Date of first day of employment or re-employment.			When any child ceases to be employed, insert opposite its name the word *Left;* or if transferred to the morning set, the word *Changed;* or the words *Young Person,* when a child completes its thirteenth year.
	Surname.	Christian Name.	Month.	Day.	Year.	

This register shall contain the names of every child under thirteen years of age employed in the factory, to be entered successively when engaged to work, whether for the first time, or, after having left, when re-engaged to work.

[*498] If any child be removed from the morning set to the afternoon set, or *vice versa*, the name of such child must be entered as a new comer in the register for the set to which it is removed, and the number of its certificate of age must be placed against its name, but no new certificate shall be required for such child.

If the mill occupier desires to change the time of working of the two entire sets of children at stated periods, (as for instance) to make a change every month, so that the children who worked in the morning

one month shall work in the afternoon the next month, and *vice versa* for the other children, alternately throughout the year, it will not be necessary to enter the names of the children anew, but the mill occupier or his agent shall only be required to make and sign the following declaration, in addition to the other details hereinbefore required :—

1. The children entered in this register as belonging to the morning set work in this factory before twelve o'clock, and not after one o'clock, on and after the first Monday of the months of—

   January, March, May, July, September, and November; and after one o'clock, and not before twelve o'clock, on and after the first Monday of the months of—

   February, April, June, August, October, and December.

2. The children entered in this register as belonging to the afternoon set work in this factory after one o'clock, and not before twelve o'clock, on and after the first Monday of the months of—

   January, March, May, July, September, and November; and before twelve o'clock, and not after one o'clock, on and after the first Monday of the months of—

   February, April, June, August, October, and December.

Signature of

Occupier or Agent.

When a change in the time of working of the two entire sets of children is made at other stated periods allowed by this act, the necessary alterations shall be made in the above declaration, to the satisfaction of the inspector or sub-inspector of the district.

In any silk factory in which children above eleven years of age are employed more than seven hours in any one day, a register of the names of such children shall be kept in the above form, distinct from the register of the names of the children who are employed in morning and afternoon sets.

In all mills where more than twenty children or young persons are employed an alphabetical index shall be kept, according to the first letter of the surname, of the names of all the children and young persons employed in the factory, adding to each *name the number of the last certificate under which the age of the child or young person [*499] is employed, or if more than sixteen years of age the letters XVI.

All the forms contained in this Schedule (B.) which shall apply to any particular factory may be bound together in one book, except the alphabetical index of reference hereinbefore referred to.

SCHEDUDE (C.)

Notices to be fixed up in the Factory.

Form for the Notice to be fixed up of the Names and Addresses of the Inspector and Sub-Inspector, the certifying Surgeon, the Clock for regulating the Factory, and the Hours of Work of all Young Persons and Females employed in the Factory.

Name and address of the inspector of the district . .
Name and address of the sub-inspector of the district .
Name and address of the surgeon who grants certificates of age for the factory . .
Clock by which the hours of work are regulated . .

The Hours of Work of all Young Persons and Females above Eighteen Years of Age employed in this Factory.(*k*)

Days of week.	Morning.		Forenoon.		Afternoon.		Evening.		Total hours.
	From	To	From	To	From	To	From	To	
*									

* In this spaee the days of the week to which the hours of work refer shall be entered.

Signature of the ceeupier of the factory or his agent.

(*k*) See 13 & 14 Vict. c. 54, s. 2, post.

*In every silk factory in which children above eleven years of age are employed more than seven hours in any one day, a separate notice, in the above form, shall be fixed up of the hours such children are employed. [500]

Form of the Notice to be fixed up of the Times allowed for Meals.

The Times allowed for Meals in this Factory.						
Days of the week.	Breakfast.		Dinner.		Tea.	
	From	To	From	To	From	To
*						

* In this space the day to which the meal hours refer shall be entered.

{ Signature of the occupier of the factory or his agent.

These notices of the regular hours of work fixed up in a factory are not required to be altered when young persons are only employed at other hours for the recovery of lost time as authorized by this act, provided the notice required to be fixed up when recovering lost time be fixed up, and provided on such notice it is stated at what time of the day it is intended to recover the time so lost.

[*501] **Form of the Notice to be fixed up when the Occupier of the Factory intends to recover all or any part of the Time which has been lost by the Stoppage of the Machinery in the Factory, as allowed by this Act.*

Account of Time lost and recovered.

TIME LOST.						TIME RECOVERED.					
Date.	Cause of Loss.	Time of Day when lost.	Amount lost.		Explanatory Remarks.	Date.	Time of Day when reco-vered.	Amount recovered.			Explanatory Remarks.
			Hours.	Mins.				Hours.	Mins.		

{ Signature of the occupier of the factory or his agent.

No lost time is required to be entered except such as it may be intended to recover.

The entries of all the details in this notice relating to any time lost or recovered shall be made in conformity with the provisions in this act.

Form of the Notice to be fixed up when Time has been lost by partial Stoppage of the Machinery by Drought or Floods, and is intended to be recovered during the following Night.

Notice of Time lost and recovered.

TIME LOST.					TIME RECOVERED.		
Description of the room where the stoppage took place, and of the machinery stopped.	Time of the day when the stoppage took place.	Amount of time lost.		Signature of the person taking time.	Time of the night when the young persons are employed.	Amount of time recovered.	
		Hours.	Min.			Hours.	Min.

*Names of the Females and young Persons who have lost Time by the Stoppage of the Machinery at the Dates affixed. [*502]

Date when Time was lost.	Surname.	Christian Name.	Date when Time was lost.	Surname.	Christian Name.

The entries of time lost, and of the names of the females and young persons who have lost time, shall be made in these notices before any part of the time can be recovered.

All notices of time lost and recovered, except when they are kept hung up in the factory, as required by this act, shall be preserved in a book in the order of their respective dates, and be open for the examination of any inspector or sub-inspector; and all such notices shall be kept for six calendar months after the lost time entered therein shall have been recovered.

SCHEDULE (D.)

Forms of Notices, Summonses, and Conviction.

Form of Notice to be given to the Occupier of a Factory, by an Inspector or Sub-Inspector, of such part of the Machinery, or such Driving Strap, or Band, in the Factory, as appears to him to be dangerous to the Workers.

To [*name of occupier*], occupier of a [*description of the manufacture*] factory, situated in the parish of and county of

I hereby give you notice, that the following parts of the machinery in your factory, namely [*here enumerate the parts*], appear *to me to be dangerous, and likely to cause bodily injury to the workers [*503]

employed in the factory; and I am of opinion that they ought severally to be immediately well and securely fenced. And I hereby further give you notice, that by the act made in the year of her Majesty's reign, intituled [*here set forth the title of this act*], it is provided, that if, after receiving this notice, you shall neglect or fail to fence the above enumerated machinery, and if any persons shall suffer any bodily injury in consequence of such neglect or failure, you will be liable to a penalty of one hundred pounds, over and above all damages, costs, and charges to which you may be found liable in any action brought against you by or on behalf of the person so injured.

Given under my hand, this day of in the year one thousand eight hundred and

(Signed) Inspector [*or* Sub-Inspector.]

Form of Summons to be issued by an Inspector or Sub-Inspector against a Person who has committed an Offence.

County of
(*or* borough of)

To the constable of

Whereas it appeareth to me I. F., one of her majesty's inspectors [*or* sub-inspectors] of factories, that A. D. of in the county [*or* borough, &c.] of hath offended against the act made in the year of her majesty's reign, intituled [*here set forth the title of this act*], forasmuch as he the said A. D., on the day of in the year of our Lord at in the county [*or* borough, &c.] of did [*here set forth the substance of the charge*]; these therefore are to require you forthwith to summon the said A. D. to appear before such two or more of her majesty's justices of the peace acting in and for the county [*or* borough, &c.] of who shall be present at in the county [or borough, &c.] of on the day of at the hour of in the noon of the same day, to answer to the said charge, and to be further dealt with according to law. And be you then there to certify what you have done in the premises. Herein fail not.

Given under my hand this day of in the year of our Lord

(Signed) I. F., Inspector [*or* Sub-Inspector.]

[*504] **Form of Summons of a Witness to be issued for an Inspector or Sub-Inspector.*

County of
(*or* borough of)

To the constable of

Whereas it appeareth to me, I. F., one of her majesty's inspectors [*or*

sub-inspector] of factories, that A. D. of in the county [*or* borough, &c.] of hath offended against the act made in the year of her majesty's reign, intituled [*here set forth the title of the act*]; forasmuch as he the said A. D. on the day of in the of our Lord at in the county [*or* borough, &c.] of did [*here set forth the substance of the charge*], and that B. P. of in the county [*or* borough, &c.] is a material witness to be examined concerning the said charge; these therefore are to require you forthwith to summon the said B. P. to appear before such two or more of her majesty's justices of the peace acting in and for the county [*or* borough, &c. of as shall be present at in the county [*or* borough, &c.] of on the day of at the hour of in the noon of the same day, to testify his knowledge concerning the premises. And be you then there to certify what you have done in the premises. Herein fail not.

Given under my hand, this day of in the year of our Lord

(Signed) I. F., inspector [*or* sub-inspector.]

Form of Conviction.

County of [liberty *or* borough, *as the case may be,*] } BE it remembered, that on the day of in the year one thousand eight hundred and A. B. [*describe the offender*] is convicted before us, J. P. and K. Q., two of her majesty's justices of the peace for the county [liberty *or* borough, *as the case may be,*] of in pursuance of an act passed in the year of the reign of queen Victoria, intituled [*here insert the title of this act,*] for that he [*describe the offence.*]

Given under our hands and seals, the day and year above written.

J. P. [L. S.]
K. Q. [L. S.]

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*8 & 9 Vict. c. 29. [*505]

An Act to regulate the Labour of Children, Young Persons, and Women, in Print Works. [30th June, 1845.]

Whereas it is expedient to regulate the labour of children, young persons, and women in print works: be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons in this present parliament assembled, and by the authority of the same, that this act shall take effect from and after the first day of January in the year one thousand eight hundred and forty-six, except any provisions for the taking effect of which any other time

shall be hereinafter specially limited; all which last-mentioned provisions shall take effect from and after such time as shall be hereinafter specially mentioned in that behalf.

2. And be it enacted, that in this act, unless another sense shall be plainly shown by the context, or by some positive enactment to the contrary, the words "print work" shall be taken to mean any building or shed, and any part thereof, within which any persons are compelled to print figures, patterns, or designs, by means of blocks or cylinders, or by means of any other tool, instrument, or mechanism, upon any woven fabrick of cotton, wool, hair, fur, silk, flax, hemp, or jute, either separately or mixed together, or mixed with any other material; or upon any felted fabric of wool or fur, either separately or mixed with any other material; or upon any cotton, linen, woollen, worsted, or silken yarn; and the words "incidental printing process" shall be taken to mean any process of preparing, dyeing, bleaching, cleaning, calendering, dressing, or finishing incident or necessary to the completion of the chief process of printing figures, patterns, or designs upon any of the aforesaid materials, and carried on within buildings, sheds, fields, or portions of ground lying adjacent to each other, or forming a part or parts of the establishment where the chief process of printing as aforesaid is carried on; and the word "child" shall be taken to mean a child under the age of thirteen years; and the words "young person" shall be taken to mean a person of the age of thirteen years and under the age of sixteen years; and the word "parent" shall be taken to mean parent, guardian, or person having the legal custody of any such child; and any word denoting the "masculine gender" and "singular number" shall be taken to include a female as well as a male, and any number of persons; and any person who shall work in any print work, whether for wages or not, or as a learner or otherwise, either in printing or in any incidental printing process, or in cleaning any part of the print work, or in cleaning any block, cylinder, tool, or machine used therein, or in any other kind of work whatsoever, save in the case [*506] hereinafter *excepted shall be deemed to be employed therein within the meaning of this act; and the word "inspector" or "sub-inspector" shall be taken to mean respectively an inspector and sub-inspector of print works; and the word "agent" shall be taken to mean any person having on behalf of the occupier of any print work the care or direction thereof or of any part thereof, or of any person employed therein; and the word "month" shall be taken to mean a calendar month; and the word "day" shall be taken to mean from six of the clock in the morning until ten of the clock in the evening of the same day; and the word "night" shall be taken to mean from ten of the clock in the evening of any one day until six of the clock of the next following morning; any part of such print work may be taken to be a print work within the meaning of this act; but this enactment shall not extend to any part of such buildings used solely for the purpose of a dwelling-house; and nothing in this act contained shall extend to any person, being a mechanic, artisan, or labourer, working only in making or reparing the machinery or any part of the print work.

3. And be it enacted, that the inspectors and sub-inspectors of facto-

ries appointed or to be appointed by virtue of an act passed in the fourth year of the reign of his Majesty, intituled "An Act to regulate the Labour of Children and Young Persons in the Mills and Factories of the United Kingdom," and of another act passed in the seventh year of the reign of her Majesty, intituled "An Act to amend the Laws relating to Labour in Factories," shall respectively be inspectors and sub-inspectors for carrying into effect the powers, authorities, and provisions of this act.

4. And be it enacted, that every inspector and sub-inspector shall have power to enter every part of any print work at any time, by day or by night, when any person shall be employed therein, and to enter by day any place which he shall have reason to believe to be a print work, and to enter any school in which children employed in print works are educated, and at all times to take with him into any print work the certifying surgeons of the district hereinafter mentioned, and any constable or other peace officer whom he may need to assist him, and shall have power to examine, either alone or in the presence of any other person, as he shall think fit, every person whom he shall find in a print work or in such a school, or whom he shall have reason to believe to be or to have been employed in a print work within twelve months next preceding the time when he shall require him to be examined touching any matter within the provisions of this act and the inspector or sub-inspector may, if he shall see fit, require such person to make and sign a declaration of the truth of the matters respecting which he shall have been or shall be so examined; and every inspector and sub-inspector shall have power to examine the registers, certificates, notices, and other documents kept in pusuance of this *act; and every person who shall refuse to be examined as aforesaid, or who shall refuse to sign his name or affix [*507] his mark to a declaration of the truth of the matters respecting which he shall have been examined, or who shall in any manner attempt to conceal or otherwise prevent any child or other person from appearing before or being examined by an inspector or sub-inspector, or who shall prevent or knowingly delay the admission of an inspector or sub-inspector to any part of a print work or school, or shall prevent an inspector or sub-inspector from examining any register, certificate, notice, or other document kept in pursuance of this act, shall be deemed guilty of wilfully obstructing the inspector or sub-inspector in the execution of the powers intrusted to him.

5. And be it enacted, that every inspector shall keep full minutes of all his visits and proceedings, and shall report the same to one of her Majesty's principal Secretaries of State twice in every year, and oftener if required, and shall report the state and condition of the print works, and of the persons employed therein whose labour is regulated by this act, and whether such print works are conducted according to the provisions of this act.

6. And be it enacted, that every person carrying on business at any print work shall, within one month next after the passing of this act, or within one month after beginning to carry on such business, send a written notice, addressed to the Office of the Factory Inspectors, London, containing the name of such print work, together with the place, township, or

parish, and county, where the same is situated, the post town to which he desires his letters to be addressed, the nature of the work, and the name of the firm under which such business is or is to be carried on.

7. And be it enacted, that the certifying surgeons appointed or to be appointed by virtue of the said act of the seventh year of the reign of her Majesty shall be certifying surgeons for carrying into effect the powers, authorities, and provisions of this act.

8. And be it enacted, that the certificates of age required by this act herein called surgical certificates, shall be given according to the form and directions contained in the schedule (A.) annexed to this act; and the name of every person for whom a surgical certificate is required by this act, and the date of the first day of employment or re-employment of such person, shall be registered in the form and according to the directions given in the Schedule (B.) annexed to this act, before it shall be lawful to employ such person in a print work.

9. And be it enacted, that no such surgical certificate given by any person who is not an appointed certifying surgeon shall be of any force unless it is given by a person duly authorized by an university or college, or other public body having authority in that behalf to practise surgery [*508] or medicine, and countersigned, *according to the form and directions given in the Schedule (A.) to this act annexed, by some justice of the peace, not being the occupier of a print work, and not being the father, son or brother of the occupier of a print work; and no person shall countersign any such surgical certificate in the absence of the person named therein, or without proof that the person brought before him is the same to whom the certificate was granted.

10. And be it enacted, that no person shall grant any surgical certificate required by this act, except upon personal inspection of the person named therein; and no certifying surgeon shall examine any person for the purposes of this act, or sign or issue any such surgical certificate, elsewhere than at the print work where such person is to be employed, unless for special cause, to be allowed by an inspector; and if a certifying surgeon shall refuse to grant a certificate of age to any person presented to him for such examination, he shall give, when required, instead of such certificate, a paper specifying under his hand the reasons for such refusal, in the form and directions given in the Schedule (A.) to this act annexed.

11. And be it enacted, that if the occupier of a print work shall agree in writing with the certifying surgeon of a district for the payment to be made by the occupier of the print work to the certifying surgeon for the examination of persons for whom surgical certificates are required by this act, and if the terms of such agreement shall be in conformity with such regulations for the guidance of the surgeons as shall be made by the inspector of the district, and shall be countersigned by the inspector in token of such conformity, all penalties which may be incurred by any party for breach of such agreement may be recovered as other penalties under this act may be recovered, and shall be applied as other penalties under this act are directed to be applied, and no such agreement shall be liable to any stamp duty.

12. And be it enacted, that an inspector shall fix the amount of fees to be paid by the occupier of a print work and the times when such fees shall be paid to the certifying surgeon, and also the times when such certifying surgeon, shall visit a print work provided he shall be required to fix such fees and visits by the occupier of a priut work and the fees so to be fixed by the inspector shall not in any case where the surgeon shall examine more than one person exceed one shilling for each person who shall be presented to him at the print work by the occupier therof or his agent to be examined, together with sixpence for every half mile that the distance of the factory from the residence of such surgeon shall exceed one mile; and such fees, including mileage, shall not be less that one shilling, and shall in no case exceed five shillings, for any one visit, except when upon such visit the certifying surgeon shall examine for the said certificates of age more than ten persons who may be brought before him as aforesaid, in which case he shall receive sixpence for each person that he may so examine, instead of all other *fees; and in any case where a print work is situated within the distance of one mile from the residence of a certifying surgeon the fee for such print work shall not exceed two shillings and sixpence for each visit, except when at any one visit he shall examine for the said certificates of age more than five persons who may be brought before him as aforesaid, in which, case he shall receive sixpence for each person that he may so examine instead of all other fees; and no certifying surgeon shall receive more than sixpence for any certificate which he may be allowed by an inspector, as hereinbefore provided, to sign or issue otherwise than at the print works where the person is to be employed; and the occupier of any print work shall pay such fees to the certifying surgeon at the time of signing such certificates, or at any other time when he may be directed by the inspector to do so; and the occupier of such print work may deduct the fee or any part thereof, not exceeding in any one case the sum of three-pence, from the wages of the person for whom the certificate may have been granted; but in any case where such agreement as aforesaid has been executed between an occupier of a print work and the certifying surgeon the amount named in such agreement shall be instead of the fees fixed by any inspector in virtue of this act: provided always, that no certifying surgeon shall be required to visit any print work situated within three miles of his residence oftener than once in each week, or to visit any print work situated at a greater distance than three miles oftener than once in every fortnight, unless with the consent of the occupier of the print work. [*509]

13. And be it enacted, that every inspector and sub-inspector may annul any surgical certificate granted under this act by writing across the surgical certificate the word "annulled," with his name, and the date of annulling such certificate; provided that in either case he shall have reason to believe the real age of the person mentioned therein to be less than that mentioned in the certificate, or provided the certifying surgeon of the district shall, upon reference made to him, deem such person to be then of deficient health or strength, or by disease or bodily infirmity incapacitated for labour, or liable to be injured by continued employment; and no certificate so annulled shall be valid in respect of the person named therein for the purposes of this act from the day when the certifi-

cate shall have been so annulled; and the production of the certificate shall be evidence that the certificate was annulled on the day so stated.

14. And be it enacted, that in case any person shall be desirous of proving the real age of any person for whom a certifying surgeon shall have refused to grant a certificate of age for the purposes of this act, or whose surgical certificate any inspector or sub-inspector shall have annulled, the inspector or sub-inspector shall, on demand, give to such person a requisition under his hand in a form to be approved of by the inspectors and by the registrar general, for the production of a duly certified copy *of the entry of the birth or baptism of such person, provided the party demanding the same shall declare the names of [*510] such person and of his parents, with the place where and the year in which he was born or baptized, which particulars shall be set forth in the requisition; and every party to whom such requisition shall have been given shall be entitled, upon payment of one shilling, to receive, on personal application, or on application in writing in such form and under such regulations as shall be approved of by the inspectors and registrar general, from any minister, registrar, or other person having the care of any register of births or baptisms in which the birth or baptism of such person is entered, a duly certified copy of the entry in such register, which shall be endorsed on the aforesaid requisition, and shall be signed by the minister, registrar, or other persons having charge of such register; and such payment of one shilling shall be instead of all other fees or payments to which such minister, registrar, or other person shall be entitled; and if the said certified copy proving the age of the person named to be such as to entitle him to have the surgical certificate required shall be produced to the certifying surgeon of the district, he shall examine the same, and if it shall appear to him that the said certified copy has not been altered or falsified in any manner, the certifying surgeon shall thereupon, without further fee or reward, give a surgical certificate in the form provided for that case in schedule (A.) to this act annexed, and shall write the word "examined" upon the certified copy of the entry of the birth of baptism which he shall have received, with his signature, and the date of such signature, and shall send such certified copy by the post to the sub-inspector of the district, who shall send a receipt for the same by post to the said surgeon, and shall keep such certified copy of the entry of the birth or baptism for future reference, if necessary; and if any inspector shall require a certified copy of the entry of the birth of any person employed in any print work from the office of the register general, he, or any person deputed by him, shall, on producing a requisition in the form hereinbefore provided, be entitled to examine the indexes to the registers in the general register office, and to receive such certified copy indorsed on the requisition without the payment of any fee; but no certified copy of the entry of any birth or baptism issued in consequence of any such requisition hereinbefore provided shall be admissible in evidence in any court or for any purpose, save for the purposes of this act; provided always, that in those cases in which a surgical certificate shall have been refused or annulled in consequence of deficient health or strength, or by reason of disease or bodily infirmity, the inspector or

sub-inspector shall not sign the requisition hereinbefore mentioned, and such person shall not be employed on proof of real age only.

15. And be it enacted, that before employing any person requiring a surgical certificate under this act the occupier of the *print work shall obtain the surgical certificate, save as hereinafter excepted, [*511] and shall keep and be bound to produce every such certificate when required to the inspector or sub-inspector; and no surgical certificate shall be valid, except for employment at the print work for which it was originally granted, or if granted by a certifying surgeon, at any other print work in the occupation of the same person who is occupier of the print work for which the certificate was originally granted, provided such other print work be in the district of the certifying surgeon who granted the certificate, and the certificate be produced in the print work where the person named in the certificate is at work; and the certifying surgeon, as often as he shall visit a print work for the purpose of granting certificates, shall enter in the register of children the date of his visit, and the other particulars set forth in the form and according to the directions given in schedule (B.) to this act annexed.

16. Provided always, and be it enacted, that no occupier of any print work shall be liable to any penalty for employing any person in any manner not contrary to the other provisions of this act, without a surgical certificate, for any time not exceeding seven working days, or, when the certifying surgeon shall reside more than three miles from the print work for any time not exceeding thirteen working days, provided all surgical certificates for that print work be granted only by the certifying surgeon appointed for that print work; but this enactment shall not be construed to authorize the employment of any person in respect of whom the certifying surgeon shall have refused to grant such surgical certificate.

17. And be it enacted, that every surgical certificate given under this act, and which shall not have been annulled, shall be evidence in the first instance of the age of the person named therein, but shall not protect any person, knowing such person to be less than the age certified, from any penalty for employing or conniving at the employment of such person otherwise than is allowed by this act; and in every proceeding on any information or complaint for employing any person contrary to this act a declaration in writing, by the certifying surgeon of the district, that he has personally examined such person, and believes him to be under such age as shall be set forth in such declaration, shall be evidence in the first instance, until the contrary shall be made to appear, that such person is under the age mentioned in such declaration.

18. And be it enacted, that if any inspector or sub-inspector shall make a complaint before a justice of the peace that the real age of any person who is employed in a print work without a surgical certificate is less than sixteen, the occupier of a print work in which such person is employed shall be liable to the penalties for employing persons for whom a surgeon's certificate is required by law without the proper surgical certificate, unless upon the proceeding for the enforcement of such *penalties he shall prove, by an extract from a legal register of birth [*512]

or baptism, that the said person had completed his sixteenth year of age.

19. And be it enacted, that after the first day of January one thousand eight hundred and forty-six no child under the age of eight years shall be employed in any print work.

20. And be it enacted, that no child shall be employed in a print work (save in the cases hereafter excepted) until the occupier thereof shall have obtained a surgeon's certificate, according to the form and directions given in the Schedule (A.) to this act annexed, in proof that such child has the ordinary strength and appearance of a child of at least eight years of age, and is not incapacitated by disease or bodily infirmity from working daily in a print work, as allowed by this act.

21. And be it enacted, that no young person shall be employed in a print work (save in the cases hereafter excepted) until the occupier thereof shall have obtained a surgical certificate according to the form and directions given in the Schedule (A.) to this act annexed, in proof that such young person has the ordinary strength and appearance of a young person of at least thirteen years of age, and is not incapacitated by disease or bodily infirmity from working in a print work, as allowed by this act.

22. And be it enacted, that after the first day of January one thousand eight hundred and forty-six no child or female shall be employed in any print work during the night.

23. And be it enacted, that after the first day of July one thousand eight hundred and forty-six, the parent or person having any direct benefit from the wages of any child employed or intended to be employed in a print work shall cause such child to attend some school for at least thirty days, together or separately, exclusive of Sundays, during the half year between the first day of January and the thirtieth day of June, both days inclusive, and in like manner for thirty days during the half year between the first day of July and the thirty-first day of December, both days inclusive, in each year, during any part of which it shall be employed in a print work, such attendance being after the hour of eight of the clock in the morning and before the hour of six of the clock in the evening, and such attendance shall not be less than one hundred and fifty hours during each half year; but no attendance above five hours on any one day shall be reckoned as a part of the said one hundred and fifty hours.(*l*)

24. And be it enacted, that so soon as a child shall be employed in a print work the parent or person having direct benefit from the wages of [*513] such child shall notify to the occupier of the *print work the school which such child is to attend during the time it is employed in such print work, and the occupiers of the print work shall enter in the register of children hereinafter required to be kept the name of the schoolmaster and the situation of the school so notified to him; and the parent or person having direct benefit from the wages of such child shall provide a school certificate book, according to the form and directions given in the schedule (A.) annexed to this act, and shall

(*l*) Sects. 23, 24, and 25 are repealed by 10 & 11 Vict. c. 70, post.

deliver the same to the master of the school which such child is to attend, and the said master shall enter therein, week by week, the attendance or absence of such child during the week, and shall produce such certificate book, while in his custody to the inspector sub-inspector of the district, when required; and the master of any school which shall be attended by children employed in a print work shall keep a register of their names and attendance, and if the inspector of the district shall disapprove of the form of register adopted by the schoolmaster, it shall be kept in such other form as the inspector shall direct.(*m*)

25. And be it enacted, that after the first day of July one thousand eight hundred and forty-six the occupier of every print work shall, before employing any child therein, obtain from a schoolmaster a certificate, according to the form and directions given in the schedule (A.) to this act annexed, that such child had attended school for at least *fifty*(*n*) days, as required by this act, during the half year ending on the thirtieth day of June or thirty-first day of December next before the beginning of such employment, and the like certificate at the beginning of each following period of six months during which the employment of such child shall be continued in that print work; and such occupier shall keep every such certificate so long as such child shall continue in his employment for twelve months after the date thereof, and shall produce the same to any inspector or sub-inspector, when required, during such period.(*m*)

26. And be it enacted, that if an inspector, on his personal examination, or on the report of a sub-inspector, shall be of opinion that any schoolmaster who grants certificates of the school attendance of children employed in a print work is unfit to instruct children, by reason of his incapacity to teach them to read and write, from his gross ignorance, or from his not having the books and materials necessary to teach them reading and writing, or because of his immoral conduct, or of his continued neglect to keep the registers, and fill up and sign the certificates of school attendance, as required by this act, the inspector of the district may annul any certificate granted by such disqualified schoolmaster, by a notice in writing addressed to the occupier of the print work in which the children named in the *certificate are employed, or his principal agent, setting forth the grounds on which he deems such schoolmaster to be unfit; and after the date of such notice no certificate of school attendance granted by such schoolmaster shall be valid for the purposes of this act, unless with the consent in writing of the inspector of the district; but no inspector shall annul any such certificate unless in the aforesaid notice he shall name some other school situated within two miles of the print work where the children named in the certificate are employed: provided always, that any schoolmaster whose certificate shall have been annulled, or the occupier of the print work in which the children named in the said certificate are employed on behalf of the schoolmaster, may appeal to the secretary of state against any such decision of the inspector, and the secretary of state may, if he think fit, rescind such [*514]

(*m*) See note (*l*), p. 512.
(*n*) Amended to *thirty* by 9 & 10 Vict. c. 18, but now repealed, supra, note (*l*).

decision: provided also, that every inspector shall in his annual report to the secretary of state state the instances (if any) in which he shall have had occasion to annul any such certificate, together with the reasons which he has in each case assigned for so doing.

27. And be it enacted, that registers shall be kept in the print work to which they relate by the occupier of every print work, according to the forms and directions given in schedule (B.) to this act annexed; and every inspector shall have power to require such occupier to send to him, in such manner as may be directed in the requisition, any extracts from such registers, and any other information with relation to the persons employed in the print work which may be requisite to facilitate the performance of the duties of such inspector in any inquiry made under the authority of this act; but no information so sent by the occupier of any print work which is not contained in the registers, certificates, and other documents required by this act to be received or kept shall be admissible in evidence in any proceeding against him for the recovery of any penalty; and the registers, certificates, and other documents required by this act to be received or kept shall be forthwith produced to the inspector or sub-inspector, on his demanding to examine the same at any time when the print work is at work

28. And be it enacted, that the hours of the day during which it is lawful to employ children, young persons, and women shall be regulated in every print work by a public clock, or by some other clock open to the public view, to be approved of in either case in writing under the hand of the inspector or sub-inspector of the district.

29. And be it enacted, that such abstract of this act as shall be directed by one of her majesty's principal secretaries of state shall be fixed on a movable board, and be hung up as soon as received by the occupier of the print work or his agent in the entrance of the print work, and in such other places as the inspector or sub-inspector of the district may direct; and notices of the names and addresses of the inspector and sub-inspector [*515] *of the district in which the print work is situated, of the clock by which the hours of work in the print work are regulated, and an alteration thereof, together with every other notice required by this act, written or printed in legible characters, and fixed on movable boards, (each particular notice being signed by the occupier of every print work or his agent,) shall be hung up at the entrance of the print work, where they may be easily read by the persons employed in the print work, and in such other places as the inspector or sub-inspector of the district may direct, and whence they shall not be removed while the print work is at work; and in case any such abstract of this act or notice shall become illegible in any part, the occupier of the print work shall cause a new copy thereof to be provided and hung up as aforesaid; and every notice required to be hung up shall be in the forms and according to the directions given in the schedule (C.) hereunto annexed.

30. And be it enacted, that the occupier of any print work in which any offence against this act has been proved to have been committed, and for which a pecuniary penalty may be imposed, shall in every case (save as hereinafter provided) be deemed in the first intance to have committed

the offence, and shall be liable to pay the penalty; but any occupier who shall have been proceeded against by any inspector or sub-inspector shall be entitled, upon complaint or information duly made by such occupier, to have any agent, servant, or workman whom he shall charge as the actual offender brought by summons before the justices at the time appointed for hearing the complaint made against him by the inspector or sub-inspector; and if after the commission of the offence has been proved the occupier of the print work shall prove to the satisfaction of the justices, that he had used due diligence to enforce the execution of the act, and that the said agent, servant, or workman had committed the offence in question without his knowledge, consent, or connivance, the said agent, servant, or workman shall be convicted of such offence, and shall pay the penalty instead of the occupier of the print work; and the payment of such penalty and costs shall be enforced against the agent, servant, or workman in like manner as penalties are made recoverable by this act: provided always, that when it shall be made to appear to the satisfaction of the inspector or sub-inspector, at the time of discovering the offence, that the occupier of the print work had used all due diligence to enforce the execution of this act, and also by what person such offence had been committed, and also that it had been committed without the personal consent, connivance, or knowledge of the occupier, and in contravention of his orders, then the inspector or sub-inspector shall proceed against the person whom he shall believe to be the actual offender in the first instance, without first proceeding against the occupier of the print work.

31. And be it enacted, that all complaints for offences against *this act shall be preferred within two months next after the com- [*516] mission of the offence, except in the case of complaints for having employed a child without the school certificate required by this act, in which case the complaints may be preferred within six months next after the commission of the offence, or in the case of complaints for offences punishable at discretion by fine or imprisonment, in which case the complaints may be preferred within twelve months next after the commission of the offence; and no person shall be liable to a larger amount of penalties for any repetition from day to day of the same kind of offence than the highest penalty hereinafter named for such offence, unless such repetition of offence shall have been committed after a complaint shall have been made for the previous offence, and except also for offences of employing two or more children or young persons or women contrary to law.

32. And be it enacted, that all complaints for the enforcement of any penalty under this act shall be heard and determined by two or more justices of the peace acting for the county or other jurisdiction wherein the offence was committed, or for any adjoining county or jurisdiction, with the like authority as though the cause of complaint had arisen within such adjoining county or jurisdiction, provided that the place of hearing the complaint in such other county or jurisdiction be not more than five miles from the place where the offence was committed; and the justices by whom any person shall be fined for any offence against this act may order that such person shall pay the penalty, and also the reasonable

costs and charges of such proceedings and conviction, either immediately or within such time as the said justices shall think fit; and in default of payment thereof any justice may cause the same to be levied by distress and sale of the goods and chattels of the party convicted, together with the reasonable costs and charges of such conviction, distress, and sale, by warrant under the hand and seal of any such justice; and where the warrant of distress is directed against the goods and chattels of any person being the occupier of a print work, it shall be lawful under such warrant to distrain any such goods and chattels found in the said print work which would be liable to be distrained for rent in arrear.

33. And be it enacted, that in England and Ireland a summons for an offence against this act shall be issued by any justice upon complaint being made to him in writing by an inspector or sub-inspector, or upon oath before him by any other person, that to the best of the knowledge and belief of the inspector, sub-inspector, or such other person, such an offence has been committed; and in Scotland a summons for an offence against this act shall be issued by any justice upon complaint being made to him in writing by an inspector or sub-inspector, or by the procurator fiscal, or by any person having a title and interest to prosecute with the concurrence of the procurator fiscal, that to the best of the knowledge and [*517] belief of such inspector, sub-inspector, *procurator fiscal, or other person, such an offence has been committed; and in every such prosecution in Scotland the proceedings shall be summary, and it shall not be necessary to take down in writing more than the substance of the evidence; and no higher or other fees shall be allowed in Scotland to the clerk of court or constables than are allowed to be paid to the sheriff clerk and sheriff officers in causes and prosecutions under the authority of an act passed in the tenth year of the reign of king George the Fourth, intituled "An act for the more effectual Recovery of Small Debts, and for diminishing the Expenses of Litigation in Causes of small Amount in the Sheriff Courts in Scotland."

34. And be it enacted, that every person who shall be summoned to answer any complaint shall be bound to appear at the time and place mentioned in the summons, and to produce before the justices then and there present every register, or other account, paper, or notice required by law to be kept by him or his agent, which shall be mentioned in the summons; and if he shall not appear accordingly then (upon proof of due service of the summons) the justices may hear and determine the case in his absence, or issue their warrant, as hereinafter provided, for enforcing his attendance, and the attendance of any witness who shall refuse or neglect to appear.

35. And be it declared and enacted, that it shall be no objection to the competency of any inspector or sub-inspector to give evidence as a witness in any prosecution under this act that it is brought at the instance of such inspector or sub-inspector, or in Scotland the procurator fiscal or other person as aforesaid.

36. And be it enacted, that any justice of the peace, upon any complaint under this act, may summon any witness to appear and give evidence at a time and place appointed for hearing such complaint, and by

warrant under his hand and seal may require any person to be brought before the justices by whom the complaint shall be heard who shall neglect or refuse to appear at the time and place appointed in any summons, proof upon oath being first given of personal service of the summons upon the person against whom such warrant shall be granted, and may commit any person coming or brought before such justices who shall refuse to give evidence to the county prison or prison of the place where such offence was committed, there to remain for any time not exceeding one month, or until such person shall sooner submit himself to be examined; and in case of such submission the order of any justice shall be a sufficient warrant to any gaoler or prison keeper for the discharge of such person.

37. And be it enacted, that every inspector and sub-inspector shall be empowered to summon any person whom he shall charge with having offended against this act, and also all witnesses who may be needed to give evidence concerning the charge; and every such summons shall be of the same effect *as if issued by a justice of the peace after complaint upon oath before him, and shall be enforced in like manner, [*518] and the like proceedings may be had thereupon, as if complaint upon oath had been made before such justice for such offence; and every constable and other peace officer to whom any such summons shall be directed shall be bound to take charge of and to serve such summons, and in default thereof shall be liable to be punished as if the summons had been issued by a justice of the peace; and every such summons of an offender or witness may be in the form provided in each case, and given in the schedule (D.) hereunto annexed; and when an inspector or sub-inspector shall summon an offender, he shall give to the same constable or peace officer a statement of the offence alleged to have been committed, who shall deliver it to a justice of the peace usually acting for the division in which the case is to be heard, or to the clerk of any such justice, at least twenty-four hours before the period named in the summons for the appearance of the party charged with such offence.

38. And be it enacted, that it shall be sufficient, in any information, complaint, or other proceeding under this act, to set forth the name of the ostensible occupier or title of the firm by which the occupier employing the workpeople of the print work may be usually known; and the service of any summons, order, or notice required by this act, or issued under the authority of this act, and not expressly directed to be personal service, may be made by leaving the same at the dwelling-house of the person to whom the same shall be addressed, or, in the case of summoning or giving an order or notice to the occupier of a print work or to a schoolmaster, by giving a copy thereof in writing to the agent of such occupier, or by sending a copy thereof by the post directed to the occupier of the print work at the print work, or to the school master at his school.

39. And be it enacted, that any person who shall be convicted of having employed any child, young person, or woman in any manner contrary to the provisions of this act, or of employing any child under the age of thirteen years without having obtained the certificate from a schoolmaster

required by this act, such person (not being the parent of such child, or the husband of such woman, nor having any direct benefit from the wages of such child or woman) shall for every such offence be adjudged to pay a penalty of not less than twenty shillings and not more than three pounds for each child, young person, or woman so illegally employed: provided always, that if the offence shall be the employment of any such [*519] child, *young person*,(*n*) or *woman during the night, the penalty shall not be less than forty shillings nor more than five pounds for each child, *young person*, or woman so illegally employed.

40. And be it enacted, that every parent and other person who shall have direct benefit from the wages of any child employed in any manner forbidden by this act, who shall wilfully connive at such illegal employment, or who shall neglect to cause such child to attend school as hereinbefore provided, or who, when required by an inspector or sub-inspector, shall fail to produce a certificate of the school attendance of such child, as required by this act, and the husband of any woman employed during the night wilfully conniving at such employment, shall be liable to a penalty of not less than five shillings and not more than twenty shillings for each offence.

41. And be it enacted, that every person convicted of wilfully obstructing an inspector or sub-inspector, in the execution of any of the powers intrusted to him by virtue of this act shall be liable for each offence to a penalty of not less than three pounds and not more than ten pounds.

42. And be it enacted, that every occupier of a print work in which an inspector or sub-inspector shall be obstructed in the night, by any attempt to prevent his making a full and complete examination of all parts of the print works, and of every person employed therein, shall be liable to a penalty of not less than twenty pounds and not more than fifty pounds.

43. And be it enacted, that every person convicted of making, giving, signing, countersigning, counterfeiting, or making use of any certificate authorized or required by or by virtue of this act, knowing the same to be untrue, or of wilfully making or wilfully conniving at making any false or counterfeited certificate, or of any false entry in any register, or any other account, paper, or notice required by or by virtue of this act, and also every person convicted of wilfully making and signing a false declaration in any proceedings under this act, shall be liable to a penalty of not less than five pounds and not more than twenty pounds, or to be imprisoned for any time not exceeding six calander months in the house of correction in the county, town, or place where the offence was committed.

44. And be it enacted, that the penalty for any offence against this

(*n*) By 9 & 10 Vict. c. 18, s. 3, after reciting this proviso, and that the words "young person" have been twice introduced into the said proviso by mistake, inasmuch as, according to the said act it is no offence to employ *male* young persons (see sect. 22) as defined in the said act, (sect. 1) during the night, it is "declared and enacted, that the said act shall be construed as if in the proviso hereinbefore recited the words 'young person' had not been inserted."

act for which no special penalty is herein provided, shall be any sum not less than two pounds and not more than five pounds.

45. And be it declared and enacted, that the non-compliance with any direction contained in any schedule to this act *annexed shall be deemed an offence against the provisions of this act. [*520]

46. And be it enacted, that every person who shall be convicted twice within twelve calendar months for an offence of the same kind against this act shall pay for the second offence any sum not less than one half of the highest penalty for that offence, and if convicted three times within twelve calendar months for an offence of the same kind shall pay not less than two-thirds of the highest penalty, and if convicted more than three times within twenty-four calendar months for an offence of the same kind he shall pay the highest penalty; but a repetition of the same kind of offence shall not be considered as the second or subsequent offences referred to in this enactment, unless such second or subsequent offence shall have been committed after a complaint has been made for the previous offences; and in any case in which a person shall be convicted at any one time for offences against this act, so that the penalties amount in the whole to more than one hundred pounds, the sum of one hundred pounds, together with all the reasonable costs and charges of such proceedings and convictions, may be paid, instead of the penalties for all offences committed by such persons before the day on which the last summons was taken out against him or her.

47. Provided always, and be it enacted, that no person shall be liable to a larger amount of penalties for any repetition from day to day of the same kind of offence than the highest penalty herein appointed for such offence, unless such repetition of offence shall have been committed after a complaint shall have been made for the previous offence; but the offence of employing two or more children or women contrary to law shall be considered a repetition of the same kind of offence within the meaning of this provision.

48. And be it enacted, that all penalties for any offence against this act shall be applied under the direction of one of her Majesty's principal Secretaries of State, and shall be paid, on account of the inspector of the district in which the penalty was imposed, to such banker as shall be appointed by such inspector to receive the same; and every person to whom any such penalty shall be paid shall pay over the amount thereof to the banker so appointed within fourteen days of receiving the same; and it shall be lawful for the Secretary of State to remit the whole or any part of such penalty; and so much thereof as shall not be so remitted, and not otherwise especially appropriated by this act, shall be applied by such inspector, under the direction of one of her Majesty's principal Secretaries of State, in such manner as shall appear best for the establishment or support of day schools for the education of children employed in printworks; and so much of an act passed in the sixth year of the reign of his late Majesty, intituled "An Act to provide for the Regulation of Corporations in England and Wales," as provides that certain *penalties and forfeitures, if recovered before any justice of any borough having a separate Court of quarter sessions of [*521]

the peace, shall be recovered for and adjudged to be paid to the treasurer of such borough, shall be repealed as to the penalties imposed under this act.

49. And be it enacted, that whenever any person shall be convicted of any offence against this act, the clerk of the peace where such conviction shall have been filed shall, upon the request in writing of any inspector or sub-inspector, deliver or cause to be delivered to him a copy of the conviction, certified under his hand to be a true copy; and every such copy shall be received as evidence of such conviction upon any future proceeding under this act; and for every such copy the clerk shall be entitled to have a fee of one shilling, and no more.

50. And be it enacted, that every conviction under this act may be in the form given in the Schedule (D.) to this act annexed, or in any other form more suitable to the case, and shall be certified in England and Ireland to the next general or quarter sessions of the peace, and in Scotland to the clerk of the justices of the peace, there to be filed amongst the records of the county, riding, division, stewartry, town, or place.

51. And be it enacted, that no appeal shall be allowed against any conviction under this act, except for an offence punishable, at discretion, by fine or imprisonment, or when the penalty awarded shall be more than three pounds; neither shall any conviction, except as aforesaid, be removable by certiorari or bill of advocation into any court whatever; and no information, conviction, or other proceeding on any complaint for an offence against this act shall be quashed or deemed illegal for matter of form, or for the want of any averment unnecessary to be proved, or the omission of any word, or for the insertion of any word, in any case in which such omission or such insertion respectively do not affect the essence of the offence, nor for the wrong designation of a name, or time, or place, where the person, time, and place intended shall have been so stated as to have been, in the opinion of the justices by whom the complaint shall have been heard, clearly understood by the person charged with such offence; and it shall not be necessary, in any information, conviction, or other proceeding under this act, to define the processes carried on in such print work, or to set out that the print work or process of employment referred to is not within any of the cases excepted, provided that it be therein stated that such print work is a print work within this act; and the proof of being within any such excepted case shall lie upon the party claiming the benefit of such exception.

52. And be it enacted, that any person aggrieved by any such conviction for which an appeal is allowed by this act may appeal to the next court of general or quarter sessions which shall be holden not less than twelve days after the day of the conviction *for the county or other [*522] jurisdiction wherein the cause of complaint shall have arisen; provided that the person so intending to appeal shall give to the inspector or sub-inspector of the district notice in writing of such appeal, and of the cause or matter thereof, within three days after the conviction or order, and seven clear days at least before such session, and shall also enter into a recognizance, with two sufficient sureties, before a justice of the peace for the county or other jurisdiction, seven clear days at the least before such ses-

sion, conditioned personally to appear at the said session, and to try such appeal, and to abide the judgment of the court thereon, and to pay such costs as shall be by the court awarded; and the court at such session shall hear and determine the matter of appeal, and shall make such order thereon as to the court shall seem meet; and in case of the dismissal of the appeal or the affirmance of the conviction or order the court shall adjudge and order the party to be punished according to the conviction, or to obey the order appealed against, and to pay such costs as shall be awarded, and shall, if necessary, issue process for enforcing such judgment.

53. And be it enacted, that in all cases in which a justice of the peace is required or empowered to do any thing under this act, or is named therein, a burgh magistrate shall have within his jurisdiction the same powers and duties as are herein given to such justice, and shall exercise the same in Scotland; but no complaint preferred for any offence against this act committed in a print work shall be heard by a justice of the peace or burgh magistrate, being an occupier of the print work, or being the father, son, or brother of the occupier of the print work, in which the offence set forth in the complaint shall have been committed.

54. And be it enacted, that this act may be amended or repealed by any act to be passed in this session of parliament.

SCHEDULES to which this act refers.

SCHEDULE (A.)

Surgical Certificate.

[*To be written or printed on white paper.*]

Print Works Regulation Act, Victoria, c.

No. —. Certificate of Age for a Child to be employed in the Print Work of situated at in

I, of duly appointed a certifying surgeon, do hereby certify, that son [*or* daughter] *of and residing in has been personally examined by me this day of on thousand eight hundred and and that the said child has the ordinary strength and appearance of a child of at least eight years of age, and that I believe the real age of the said child to be at least eight years; and that the said child is not incapacitated by disease or bodily infirmity from working in the above-named print work for the time allowed by this act. [*523]

(Signed) Certifying Surgeon.

The form of surgical certificate to be given to a child who has obtained

a certificate of real age shall be the same as above, omitting the words, "and that the said child has the ordinary strength and appearance of a child of at least eight years of age, and that I believe the real age of the said child to be at least eight years," and substituting these words in their place: "and that a certificate of the birth [*or* baptism] of the said child has been produced to me in the form required by this act, proving that the real age of such child is at least eight years."

[*To be written or printed on coloured paper.*]

PRINT WORKS REGULATION ACT, VICTORIA, c.

No. ——. Certificate of Age for a Young Person to be employed in the Print Work of situate at in

I, of duly appointed a certifying surgeon, do hereby certify, that son [*or* daughter] of and residing in has been personally examined by me this day of one thousand eight hundred and and that the said young person has the ordinary strength and appearance of a young person of at least thirteen years of age, and that I believe the real age of the said young person to be at least thirteen years; and that the said young person is not incapacitated, by disease or bodily infirmity, from working in the above named print work for the time allowed by this act.

(Signed) Certifying Surgeon.

The form of surgical certificate to be given to a young person who has obtained a certificate of real age shall be the same as the above, omitting the words "and that the said young person has the ordinary strength and appearance of a young person of at least thirteen years of age, and that I believe the real age of the said young person to be at least thirteen years," and substituting these words in their place, "and that a certificate of the birth [*or* baptism] of the said young person has been produced to me in the form required by this act, proving that the real age of such young person is at least thirteen years."

[*524] *The form of surgical certificate to be given in either case by any practitioner who is not a certifying surgeon must be the same as the corresponding form above given, omitting the words "duly appointed a certifying surgeon," and substituting the words "duly authorized by the university [*or* college, *or other public body having authority in that behalf*] of to practise surgery [*or* medicine]," and making the following addition which must be signed by a justice of the peace or burgh magistrate:—

The child [*or* young person] named in the above-written certificate has been this day brought before me; and the appearance of the said

child [*or* young person] agrees with the description therein given; and I believe the real age of the said child [*or* young person] to be at least [*here insert the word* "eight" *or* "thirteen" *in the case of a young person*,] years; and I declare that I have no beneficial interest in and am not the occupier of any print work, and that I am not the father, son, or brother of the occupier of any print work.

Dated this day of one thousand eight hundred and

Signed C. D. Justice,
[*or* Burgh magistrate].

In every surgical certificate of age the day of the month on which it shall be granted shall be written in words, and not in figures.

So soon as any certificates authorized by this act to be received as proof of the age of any person shall be obtained by the occupier of a print work or his agent, they shall be fixed in a book, to be called "The Age Certificate Book," in the order of the dates at which they shall have been respectively received: and such certificate shall be numbered in the order in which they are so fixed in the book; but the certificates for children shall be kept in a separate and distinct place in the said book, or in a separate book, and shall be marked with a series of running numbers distinct from that of the certificates for young persons.

So soon as any certificate of age authorized by this act shall be obtained the number hereinbefore required to be set against each certificate shall be set against the name of the child or young person to whom such certificate has been granted, in the first column of the register of the persons employed required by this act to be kept in each factory.

If a surgeon shall have refused to grant a certificate of age to any child or young person, the word "refused," shall be written by the surgeon in the column of the register where the numbers of the certificates are required to be inserted.

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*Print Works Regulation Act, Victoria, c. [*525]

Certificate Refused.

I, of duly appointed a certifying surgeon, do hereby declare, that son [*or* daughter] of residing in has been personally examined by me this day of one thousand eight hundred and and that in my opinion the said [child *or* young person] has not the ordinary strength and appearance of a child of at least eight years of age [*or* of a young person of at least thirteen years of age] or [*or* and] is

incapacitated by disease and bodily infirmity from working in a print work for the time allowed by this act.

(Signed) Certifying Surgeon.

N. B.—The words within brackets shall be in the hand-writing of the certifying surgeon, who shall insert the reason of his refusal, to be either on account of deficient age or of bodily infirmity, or both, as the case may be.

Print Works Regulation Act, Victoria, c.

SCHOOL CERTIFICATE BOOK.(*o*)

I hereby certify, that the child A. B., son [*or* daughter] of C. D. and E. F., residing in attended the school kept by me at in the parish and county of for the number of hours and at the time on each day specified in the columns opposite to his [*or* her] name.

During the week ending on Saturday the day of 18 .

Monday.		Tuesday.		Wednesday.		Thursday.		Friday.		Saturday.		Total number of hours during this week.
From	To	From	To	From	To	From	To	From	To	From	To	

Signed Schoolmaster,
this day of 18 .

[·526] *During the week ending on Saturday the day of 18 .

Monday.		Tuesday.		Wednesday.		Thursday.		Friday.		Saturday.		Total number of hours during this week.
From	To	From	To	From	To	From	To	From	To	From	To	

Signed Schoolmaster,
this day of 18 .

(*o*) Repealed by 10 & 11 Vict. c. 70, post.

Under the column headed with the days of the week the periods of the day that each child attends school shall be stated, as thus, from nine to twelve, or from two to five, or any other time, as the case may be.

The time when each child attends school, or the word "Absent," shall be stated in the columns for each day, in the handwriting of the schoolmaster; and no certificate shall be valid unless the schoolmaster shall, in his own handwriting, subscribe to it his Christian and surname in full.

Each certificate book shall contain twenty-six forms similar to the above, and shall be valid for the purposes of this act for six months only either from the first day of January to the last day of June, or from the first day of July to the last day of December of any year; and at the expiration of either period of six months such certificate book, containing the school attendance of the child certified, shall be delivered by the parent or other person having direct benefit from the wages of such child to the occupier of the print work where such child is employed, and if the child cease to be employed in the print work to the occupier of which such school certificate book was delivered, the parent or other person as aforesaid shall be entitled, on demand, to have the said certificate book restored to him.

SCHEDULE (B.)

Registers.

**Form for the Register of Children.* [*527]

List of Children employed in this Print Work.

No. of Reference to Age Certificate Book, as required by Schedule (A.)	NAMES.		Dates of first day of being employed or re-employed.			When any child ceases to be employed, insert opposite the name the word *Left*; and when any child completes his thirteenth year of age, the word *Thirteen*.	School at which the child attends.	
	Surname.	Christian Name.	Month.	Day.	Year.		Name of the Master.	Situation of the School.

This register shall contain the name of every child employed in the print work, to be entered in alphabetical order, successively when engaged

to work, whether for the first time, or, after having left, when re-engaged to work.

At the beginning of this register shall be inserted—

1. The name of the occupier or firm.

2. The name of the print work, the place, township, parish, and county where it is situated, and the post office to which the occupier desires his letters to be directed.

3. The nature of the work carried on.

4. The clock by which the employment of the workers in the print work is regulated.

Every alteration in any of the above particulars shall be inserted immediately after the alteration shall have been made.

[*528] *Form for the Register of Young Persons.*

List of Young Persons employed in this Factory.

No. of reference to Age Certificate Book, as required in Schedule (A.)	NAMES.		Date of first day of being employed or re-employed.			When any young person ceases to be employed, insert opposite the name the word *Left;* and when a any young person completes his sixteenth year of age, the word *Sixteen.*
	Surname.	Christian Name.	Month.	Day.	Year.	

The visits of the certifying surgeon to the print work shall be recorded in this register in the manner following.

Date of visit.	Number of persons presented for examination.	Number of certificates granted.	Signature of surgeon.
	*	†	

* If the surgeon shall be told that there is no child or young person in the print work to be examined at the time of his visit, he shall insert in this column the word "None."

† If none granted he shall insert the word "None."

*SCHEDUDE (C.) [*529]

Notices to be fixed up in the Print Work.

Form for the Notice to be fixed up of the Names and Addresses of the Inspector and Sub-Inspector, and Clock for regulating the Hours of Work in the Print Work.

Name and address of the inspector of the district . .	
Name and address of the sub-inspector of the district .	
Name and address of the surgeon who grants certificates of age for the print work . .	
Clock by which the hours of work are regulated . .	

SCHEDULE (D.)

Forms of Summonses and Conviction.

Form of Summons to be issued by an Inspector or Sub-Inspector against a Person who has committed an offence.

County of
[*or* borough of]
To the constable of

Whereas it appeareth to me, I. F., one of her Majesty's inspectors [*or* sub-inspector] of factories, that A. D. of in the county [*or* borough, &c.] hath offended against the act made in the year of her Majesty's reign, intituled [*here set forth the title of this act*]; forasmuch as he the said A. D., on the day of in the year of our Lord at in the county [*or* borough, *&c.*] of did [*here set forth the substance of the charge*]: These, therefore, are to require you forthwith to summon the said A. D. to appear before such two or more of her Majesty's justices of the peace acting in and for the county [*or* borough, *&c.*] of who shall be present at in the county [*or* borough, *&c.*] of on the day of at the hour of in the noon of the same day, to answer to the said charge, and to be further dealt with according to law, and be you then there to certify what you have done in the premises. Herein fail not.

Given under my hand, this day of in the year of our Lord .

Signed I. F., inspector [*or* sub-inspector].

[*530] **Form of Summons of a Witness to be issued by an Inspector or Sub-Inspector.*

County of , }
[*or* borough of] }

To the constable of

Whereas it appeareth to me, I. F., one of her Majesty's inspectors [*or* sub-inspector] of factories, that A. D. of in the county [*or* borough, *&c.*] of hath offended against the act made in the year of her Majesty's reign intituled [*here set forth the title of the act*]: forasmuch as he the said A. D., on the day of in the year of our Lord at in the county [*or* borough, *&c.*] of did [*here set forth the substance of the charge*], and B. P. of in the county [*or* borough, *&c.*] is a material witness to be examined concerning the said charge: These, therefore, are to require you forthwith to summon the said B. P. to appear before such two or more of her Majesty's justices of the peace acting in and for the county [*or* borough, *&c.*] of as shall be present at in the county [*or* borough, *&c.*] of on the day of at the hour of in the noon of the same day, to testify his knowledge concerning the premises, and be you then there to certify what you have done in the premises. Herein fail not.

Given under my hand, this day of in the year of our Lord .

Signed I. F., inspector [*or* sub-inspector.]

Form of Conviction.

County of } Be it remembered, that on the day of
[liberty *or* borough, } in the year one thousand eight hundred
as the case may be] } and A. B. [*describe the offender*] is convicted before us J. P. and K. Q., two of her Majesty's justices of the peace for the county [liberty *or* borough, *as the case may be,*] of in pursuance of an act passed in the year of the reign of Queen Victoria, intituled [*here insert the title of this act,*] for that he [*describe the offence.*]

Given under our hands and seals, the day and year above written.

J. P. (L. S.)
K. Q. (L. S.)

[*531] *8 & 9 Vict. c. 77.

An Act to make further Regulations respecting the Tickets of Work to be delivered to Persons employed in the Manufacture of Hosiery, in certain cases. [4th August, 1845.]

Whereas by an act passed in the fifth year of the reign of King George

the Fourth, intituled "An act to consolidate and amend the Laws relative to the Arbitration of Disputes between Masters and Workmen," it was enacted,(*p*) amongst other things, that "with every piece of work given out by the manufacturer to a workman to be done, there shall (if both parties are agreed) be delivered a note or ticket in such form as the said parties shall mutually agree upon:" And whereas it is expedient that, so far as relates to persons employed in the woollen, worsted, linen, cotton, and silk hosiery manufactures, such further provision should be made for delivery to them of a note or ticket of work as hereinafter is expressed: Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, that from and after the first day of January in the year one thousand eight hundred and forty-six, when any manufacturer of hosiery, or the agent of any such manufacturer, gives out to a workman the materials to be wrought, such manufacturer or agent shall at the same time deliver to such workman a printed or written ticket, signed by such manufacturer, containing the particulars of the agreement between such manufacturer and such workman, as in the schedule to this act annexed; and such manufacturer or agent delivering such ticket shall make or cause to be made, and shall preserve until the work contracted to be done shall have been completed or paid for, a duplicate of such note or ticket.

2. And be it enacted, that in the event of any dispute between the manufacturer or his agent and the workman, such ticket, and the said duplicate thereof, shall be required to be produced, and shall, together or either of them, be evidence of all things mentioned therein or respecting the same.

3. Provided always, and be it enacted, that where the subject of dispute relates to the alleged improper or imperfect execution of any work delivered to a manufacturer or his agent, such piece of work shall be produced in order to adjudication, or if not produced shall be deemed and taken to have been sufficiently and properly executed.

4. And be it enacted, that if any manufacturer or agent shall neglect or refuse to deliver such ticket to such workman *as aforesaid with the materials so given out, and if such workman shall complain [*532] thereof to any justice of the peace having jurisdiction in the place where the material shall have been delivered out or where the workman shall reside, such justice may summon such manufacturer or agent to attend before two justices at a time or place appointed for hearing the complaint, as set forth in the summons; and if the person to whom such summons so directed appears according to the tenor thereof, or if he does not appear, and the due service of the summons is proved, the said justices may proceed to hear and determine the complaint; and if such neglect or refusal as aforesaid be proved, either by the confession of the party complained against, or by the oath of the complainant or of any other credible witness or witnesses, such justices may convict such offender, and may upon such conviction adjudge him to pay such penalty not exceeding five pounds, together with the costs attending the conviction, as such justices shall

(*p*) Sect. 18, ante, 326.

think fit, and the party so adjudged to pay such penalty and costs shall pay the same accordingly: provided always, that in all convictions of adjudications under this act one at least of the convicting or adjudicating justices shall be a person not engaged in any manufacture, trade, occupation or employment to which this act extends, and shall not be the father, son, or brother of any such person.

5. And be it enacted, that if any of the parties to the said complaint shall make oath before any justice having cognizance of such complaint that he or she believes that the attendance of any person as a witness will be material to the hearing of such complaint, such justice may summon such person, having been paid or tendered a reasonable sum for his expenses, to appear and give evidence on oath at a time and place set forth in the said summons; and if any person so summoned shall not appear at the time and place set forth in the said summons, and shall not make excuse for the default to the satisfaction of the justices there present, and if the due service of the summons, be proved, or if such person appearing according to the summons shall not submit to be examined as a witness, then such justices may adjudge such person so making default in appearing or refusing to give evidence to pay such penalty not exceeding two pounds as such justices shall think fit, and the party so adjudged to pay such penalty shall pay the same accordingly.

6. And be it enacted, that every summons required by this act shall be served by delivering the same to the person summoned, or by leaving the same at his or her usual place of abode, twenty-four hours at least before the time appointed by the summons for such person to appear.

7. And be it enacted, that if any such penalty or costs so adjudged by any justices to be paid is not paid immediately upon adjudication, such justices may issue their warrant to distrain and sell the goods and chattels of the person so adjudged to pay the same, for the amount thereof, with costs; and the proceeds *of such distress, after paying the penalty [*533] and costs, and the costs of such distress and sale, shall be paid over to the person convicted; and the said penalty shall be paid over to the sheriff or other proper officer of the county, city, borough, or place in which such conviction shall take place, for her Majesty's use, and shall be returned to the Court of quarter sessions, under the provisions of an act passed in the third year of the reign of King George the Fourth, intituled "An Act for the more speedy Return and levying of Fines, Penalties, and Forfeitures, and Recognizances estreated."

8. And be it enacted, that no order or conviction, or proceeding touching the same respectively, shall be quashed for want of form, or be removed by certiorari or otherwise into any of her Majesty's superior Courts of record; and that when any distress shall have been made for levying any money by virtue of this act the distress itself shall not be deemed unlawful, nor the party making the same a trespasser, on account of any defect or want of form in the summons, warrant, conviction, warrant of distress, or other proceedings in relation thereto, nor shall the party distraining be deemed a trespasser from the beginning on account of any irregularity afterwards committed by him, but the person aggrieved

by such irregularity may recover full satisfaction for special damage (if any) by action on the case.

9. And be it enacted, that the word "manufacturer" in this act shall be understood to mean any person furnishing the materials of work to be wrought into hosiery goods, to be sold or disposed of on his own account, and the word "agent" to include any person conveying or delivering the same to the workman, and the word "workman" any person actually employed in the manufacture of the same.

10. And be it enacted, that this act may be amended or repealed by any act passed in the present session of parliament.

SCHEDULE.

If the material to be manufactured be into stockings:
Guage: Ribbed or plain: What kind of material: Size: Jacks in width: Mark: Length of leg: Length of foot: Narrowings in leg: Narrowings in heel: *Narrowings in gusset: Narrowings in toe: Dumps or clocks: Round heels or toes: [*534] Wrought heels or cut: Turnings in leg: Welted or not: Weight per dozen: Price per dozen pair of making legs: Price per dozen pair of making feet: Name of party putting out the work: Name of artificer.

If the material to be manufactured be into socks:
Guage: Ribbed or plain: What kind of material; Size: Jacks in width: Mark: Length of leg with top: Length of foot: Narrowings in heel: Narrowings in gusset: Narrowings in toe: Cut or wrought heels: Cut or wrought feet: Price per dozen pair: Name of party putting out the work: Name of artificer.

If the material to be manufactured be into gloves:
Guage: Ribbed or plain: What kind of material: Size: Jacks in width of hand: Jacks in width of finger: Mark: Length of hand; Length of finger: What kind of welts: Plaited or not: What figure in back of hand: Weight per dozen: Price per dozen pair of making hands; Price per dozen pair of making fingers: Name of party putting out the work: Name of artificer.

*If the material to be manufactured be into shirts: [*535]
Guage: Ribbed or plain: What kind of material: Size: Jacks in width of body: Jacks in width of sleeve: Mark: Length of body: Length of sleeve: Fashioned or not; Welted or not: Weight per dozen: Price per dozen: Price per dozen of making bodies: Price per dozen pair of making sleeves: Name of party putting out the work: Name of artificer.

If the material to be manufactured be into caps:
Guage: Ribbed or plain: Material: Jacks in width: Fashion: Striped or plain: Weight per dozen: Price per dozen: Name of party putting out the work: Name of artificer.

If the material to be manufactured be into any other description of hosiery.
Guage: Length: Width: Weight: Price: Fashion: Name of party putting out the work: Name of artificer.

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8 & 9 Vict. c. 128.

An Act to make further Regulations respecting the Tickets of Work to be delivered to Silk Weavers in certain cases. [9th August, 1845.]

Whereas by an act passed in the fifth year of the reign of King George the Fourth, intituled "An Act to consolidate and [*536] *amend the Laws relative to the Arbitration of Disputes between Masters and Workmen," it was enacted,(q) amongst other things, that "with every piece of work given out by the manufacturer to a workman to be done there shall (if both parties are agreed) be delivered a note or ticket in such form as the said parties shall mutually agree upon:" and whereas it is expedient that, so far as relates to silk weavers, such further provision shall be made for delivery to them of a note or ticket of work as hereinafter is expressed: be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, that from and after the first day of January in the year one thousand eight hundred and forty-five when any manufacturer of silk goods or of goods made of silk mixed with other materials, or the agent of any such manufacturer, gives out to a weaver of such goods a piece of warp to be woven, such manufacturer or agent shall at the same time deliver to such weaver (unless both parties shall by writing under their respective hands agree to dispense therewith) a printed or written ticket, signed by such manufacturer or agent, containing the following particulars of the agreement between such manufacturer or agent and such weaver; (that is to say,)

The count or richness of the warp or cane:
The number of shoots or picks required in each inch:
The number of threads of weft to be used in each shoot:
The name of the manufacturer, or the style of the firm under which he carries on business:
The weaver's name, with the date of the engagement:
And the price in sterling money agreed on for executing each yard

(q) Sect. 18, ante, p. 326.

imperial standard measure of thirty-six inches of such work in a workmanlike manner:

And such manufacturer or agent delivering such ticket shall make or cause to be made, and shall preserve until the work contracted to be done shall have been completed or paid for, a duplicate of such note or ticket.

2. And be it enacted, that in the event of any dispute between the manufacturer or his agent and the workmen, such ticket and the said duplicate thereof shall be required to be produced, and shall, together or either of them be evidence of all things mentioned therein, or respecting the same.

3. Provided always, and be it enacted, that where the subject of dispute relates to the alleged improper or imperfect execution of any work delivered to any manufacturer or his agent, such piece of work shall be produced, in order to adjudication, or if not produced shall be deemed and taken to have been sufficiently and properly executed.

*4. And be it enacted, that if any of the parties to the said complaint shall make oath before any justice having cognizance [*537] of such complaint, that he or she believes that the attendance of any person as a witness will be material to the hearing of such complaint, such justice may summon such person having been paid, or tendered a reasonable sum for his expenses, to appear and give evidence on oath before him at a time and place set forth in the said summons; and if any person so summoned shall not appear at the time and place set forth in the said summons, and shall not make excuse for the default to the satisfaction of such justice, and if the due service of the summons be proved, or if such person appearing according to the summons shall not submit to be examined as a witness, then such justice may adjudge such person so making default in appearing or refusing, to give evidence to pay such penalty not exceeding five pounds as such justice shall think fit, and the party so adjudged to pay such penalty shall pay the same accordingly.

5. And be it enacted, that every summons required by this act shall be served by delivering the same to the person summoned, or by leaving the same at his or her usual place of abode, twenty-four hours at least before the time appointed by the summons for such person to appear.

6. And be it enacted, that if any such penalty or costs so adjudged by any justice to be paid is not paid immediately upon adjudication such justice may issue his warrant to distrain and sell the goods and chattels of the person so adjudged to pay the same for the amount thereof, with costs and the proceeds of such distress, after paying the penalty and costs, and the costs of such distress and sale, shall be paid over to the person convicted; and the said penalty shall be paid over to the sheriff or other proper officer of the county, city, borough, or place in which such conviction shall take place, for her Majesty's use, and shall be returned to the Court of quarter sessions, under the provisions of an act passed in the third year of the reign of King George the Fourth intit-

uled "An Act for the more speedy Return and levying of Fines, Penalties and Forfeitures, and Recognizances estreated."

7. And be enacted, that if any silk manufacturer or other party employing, contracting, or engaging with any person for any work in any branch of the said manufacture, or connected therewith or incidental thereto, or for specific work or otherwise, and whether such person is to be paid according to the nature or amount of the work done, the time employed, or any other manner, shall not from time to time pay and discharge all such sums of money and wages as shall be justly due and payable to any such person, it shall be lawful for a justice of the peace, on complaint made for that purpose, to summon such manufacturer or other party to appear at a time and place to be named in such summons, and for any two or more justices of the peace to hear and determine such complaint, and order payment of *such sum as shall appear to [*538] such justices to be justly due and payable, together with costs for loss of time and recovering the same, and in default of payment immediately, or within such period as such justices shall direct, the said justices shall issue their warrant to levy the same by distress and sale of the goods and chattels of the said manufacturer or other party; and the said justices, if they shall think fit, may also, by order in writing, authorize such person to return his work unfinished; and such justices shall also fine such manufacturer or other party for such neglect of payment, if the first offence five pounds, and for the second ten pounds, and five pounds extra for every succeeding offence, unless the said manufacturer or other party shall deliver to the said person employed a notice in writing, within four-and-twenty hours after such refusal to pay to the said person employed the amount of wages due, stating the reasons for such refusal in full, and that the said manufacturer or other party intends to have such work arbitrated.

8. And be it enacted, that no order or conviction or proceeding touching the same respectively shall be quashed for want of form, or be removed by certiorari or otherwise into any of her Majesty's superior Courts of record; and when any distress shall have been made for levying any money by virtue of this act the distress itself shall not be deemed unlawful, nor the party making the same a trespasser, on account of any defect or want of form in the summons, warrant, conviction, warrant of distress or other proceedings in relation thereto, nor shall the party distraining be deemed a trespasser from the beginning on account of any irregularity afterwards committed by him, but the person aggrieved by such irregularity may recover full satisfaction for special damage (if any) by action on the case.

9. And be it enacted, that this act may be amended or repealed by any act to be passed in the present session of parliament.

10 & 11 Vict. c. 29.

An Act to limit the Hours of Labour of Young Persons and females in Factories. [8th June, 1847.]

Whereas an act was passed in the fourth year of the reign of his late Majesty intituled "An Act to regulate the labour of Children and Young Persons in the Mills and Factories of the United Kingdom;"(r) and an another act was passed in the session of parliament held in the seventh and eighth years of the reign of her present Majesty, intituled "An Act to amend the Laws relating to Labour in Factories;"(s) and by the said *first mentioned act it was provided, that no person under the age of eighteen years should be employed in any [*539] such mill or factory as in the said act is mentioned, in any such description of work as hereinbefore specified, more than twelve hours in any one day, nor more than sixty-nine hours in any one week, except as hereinafter is provided; and by the said last-mentioned act it was provided, that no female above the age of eighteen years should be employed in any factory as defined by the said act, save for the same time and in the same manner as young persons (by the said act defined to be persons of the age of thirteen years and under the age of eighteen years) might be employed in factories: And whereas it is expedient to alter the said acts for the purpose of further restricting the hours of labour of young persons and females in factories: be it enacted by the Queen's most excellent Majesty by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, that, notwithstanding any thing in the said acts contained, from the first day of July one thousand eight hundred and forty-seven no person under the age of eighteen years shall be employed in any such mill or factory, in such description of work as in the said first mentioned act is specified, for more than eleven hours in any one day, nor for more than sixty-three hours in any one week, except as in the said act is provided; and that from the said first day of July one thousand eight hundred and forty-seven the said two acts before mentioned shall in all respects be construed as if the provision in the provision in the said first mentioned act contained, as to persons under the age of eighteen years working in mills and factories had been confined to eleven hours instead of twelve hours in any one day, and to sixty-three hours in any one week instead of sixty-nine hours.

2. And be it enacted, that from the first day of May one thousand eight hundred and forty-eight no person under the age of eighteen years shall be employed in any such mill or factory, in such description of work as in the said first mentioned act is specified, for more than ten hours in any one day nor more than fifty-eight hours in any one week, except as in the said act is provided; and that from the first day of May one thousand eight hundred and forty-eight the said two acts shall in all respects

(r) Ante, p. 424. (s) Ante, p. 463.

be construed as if the provision in the said first mentioned act contained, as to persons under the age of eighteen years working in mills and factories, had been confined to ten hours instead of twelve hours in any one day, and fifty-eight hours in any one week instead of sixty-nine hours.

3. And be it enacted, that the restrictions respectively by this act imposed as regards the working of persons under the age of eighteen years shall extend to females above the age of eighteen years.

[*540] *4. And be it enacted, that the said two hereinbefore mentioned acts as amended by this act, and this act, shall be construed together as one act.

5. And be it enacted, that this act may be amended or repealed by any act to be passed in this present session of parliament.

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10 & 11 Vict. c. 70.

An Act to amend the Law as to the School Attendance of Children employed in Print Works. [22nd July, 1847.]

Whereas it is expedient that so much of an act passed in the ninth year of the reign of her Majesty, intituled "An Act to regulate the Labour of Children, Young Persons, and Women in Print Works,"(*t*) as relates to the school attendance of children employed in print works, should be amended: be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, that those parts of the said act which in the copies thereof printed by the Queen's printer are printed as separate clauses, and severally numbered 23, 24, and 25, and also so much of the schedule annexed to the said act marked (A.) as relates to certificates of school attendance shall be repealed from and after the first day of August in the year one thousand eight hundred and forty-seven; provided, that all certificates given before the said first day of August shall be as valid as if this act had not been passed, and all offences committed before the said first day of August against any of the enactments hereby repealed shall be dealt with and punished as if this act had not been passed.

2. And be it enacted, that the master of any school which shall be attended by children employed in a print work shall keep a register of their names and attendance, and if the inspector of the district shall disapprove of the form of register adopted by the school master it shall be kept in such other form as the inspector may direct.

3. And be it enacted, that after the said first day of August the occupier of every print work shall, before employing any child therein, obtain from a schoolmaster a certificate, according to one of the forms and according [*541] to the directions given in the *schedule marked (A.) to this act annexed, that such child had attended school for at least thirty days and not less than one hundred and fifty hours during the half-year immediately preceding the first day of the employment of such child, or if it shall have left the said print works and shall be again employed there-

(*t*) Ante, p. 505.

in, the said school attendance shall have been during the half-year immediately preceding the first day of such re-employment, and such school attendance shall be after the hour of eight of the clock in the morning, and before the hour of six of the clock in the evening; but no attendance of less than two and a half hours on any one day shall be reckoned as any part of the said one hundred and fifty hours, nor shall any attendance on any one day for more than five hours be reckoned for more than five hours; and a like certificate shall be obtained at the beginning of each period of six calendar months during which the employment of such child shall be continued in that print work; and such occupier shall keep every such certificate so long as such child shall continue in his employment for twelve calendar months after the date thereof, and shall produce the same to any inspector or sub-inspector when required during such period.

4. And be it enacted, that from and after the said first day of August the forms of certificates of school attendance of children employed in print works shall be in one of the forms given in the schedule marked (A.) annexed to this act.

5. And be it enacted, that this act and the said act as amended by this act shall be construed together and as one act.

6. And be it enacted, that this act may be amended or repealed by any act to be passed this session of Parliament.

SCHEDULE to which the foregoing Act refers.

*SCHEDULE (A.) [*542]

I.—*Form of School Certificates for one Child.*

I hereby certify, that the child A. B., son [*or* daughter] of C. D. and E. F., residing in attended the school kept by me at for the number of hours and at the time on each day specified in the columns opposite to his [*or* her] name. During the several weeks ending the day, month, and year stated in the first column.

Week ending Saturday.			Monday.		Tuesday.		Wednesday.		Thursday.		Friday.		Saturday.		Total No. of hours during this week.	Signature of School master.	Date of signing.
Day.	Month.	Year.	From	To	From	To	From	To	From	To	From	To	From	To			

No part of the school attendance certified shall be valid for a longer time than six months after the date of such attendance; and if a child for whom this form of certificate has been given shall cease to be employed in the print work to the occupier of which such school certificate was delivered, the child's parent, or any person having direct benefit from the wages of such child, shall be entitled on demand to have the said certificate restored to him.

*II.—*Form of School Certificate which may be used when two or more Children employed in the same Print Work attend the same School.* [*543]

I hereby certify, that the children whose names are underwritten, employed in the print work of at in the parish of and county of . attended for the number of hours and at the time specified in the columns opposite to their respective names, at the school kept by me at in the parish of and county of

During the week ending on Saturday the day of 18 .

Child's Name.		Mond.		Tues.		Wedns.		Thurs.		Friday.		Satur.		Total No. of hours during this week.
Surname.	Christian Name.	From	To	From	To	From	To	From	To	From	To	From	To	

Signed Schoolmaster.

This day 18 .

General Directions applicable to both Forms.

In the columns headed with the days of the week, the hours of attendance shall be stated; as thus, from Nine to Twelve, or from Two to Five, or any other time, as the case may be; and the schoolmaster shall, in his own handwriting, fill up the date when the week ends during any part of which the child shall have attended his school.

The hours of school attendance, or the word "absent" shall be stated in the column for each day, in the handwriting of the schoolmaster; and no certificate shall be valid, unless the schoolmaster shall in his own handwriting subscribe to it his Christian and surname in full, affixing the date when he signs the same.

[*544] *13 & 14 Vict. c. 54.

An Act to amend the Acts relating to Labour in Factories.
[5th August, 1850.]

Whereas by an act passed in the fourth year of the reign of his late Majesty, intituled, "An Act to regulate the Labour of Children and Young Persons in the Mills and Factories of the United Kingdom," it was enacted,(*u*) that no person under the age of eighteen years should be employed in any mill or factory as in the said act mentioned, in any such description of work as therein specified, more than twelve hours in any one day, except as thereinafter provided: and whereas by an act passed in the seventh year of the reign of her present Majesty, intituled "An Act to amend the Laws relating to Labour in Factories," it was enacted,(*v*) that the hours of work of children and young persons in every factory should be reckoned from the time when any child or young person should first begin to work in the morning in such factory; and by the same act it was enacted,(*w*) that no female above the age of eighteen years should be employed in any factory, save for the same time and in the same manner as young persons might be employed in factories: and whereas by an act passed in the tenth year of the reign of her present Majesty, intituled "An Act to limit the Hours of Labour of young Persons and Females, in Factories,"(*x*) the hours of labour of young persons and females in factories were further restricted as therein is mentioned: and whereas it is expedient to amend the said hereinbefore recited acts: be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal and commons, in this present parliament assembled, and by the authority of the same, that, save as hereinafter mentioned, so much of the said acts as restricts or limits the hours of the employment or labour of young persons, and of females above the age of eighteen years, shall be repealed, and after the passing of this act, no young person, and no female above the age of eighteen years, shall be employed in any factory before six of the clock in the morning or after six of the clock in the evening of any day (save to recover lost time as hereinafter provided,) and no young person, and no female above the age of eighteen years shall be employed in any factory, either to recover lost time or for any other purpose, on any Saturday after two of the clock in the afternoon.

2. And be it enacted, that so much of the said secondly recited act as requires notice in the form given in the schedule *(C.) to such [*545] act of the hours of work of all young persons, and females above the age of eighteen years, employed in the factory, to be hung or fixed up in any factory, and so much of the same act as enacts that in any complaint of the employment of any person in a factory otherwise than is allowed by that act the time of beginning work in the morning

(*u*) Sect. 2, ante, p. 425.
(*v*) Sect. 26, ante, p. 472.
(*w*) Sect. 32, ante, p. 475.
(*x*) See the act, ante, p. 538.

which shall be stated in any notice fixed up in the factory, signed by the occupier or his agent, shall be taken to be the time when all persons in the factory, except children beginning to work in the afternoon, began work on any day subsequent to the date of such notice, so long as the same continued fixed up in the factory, shall be repealed.

3. And whereas by the said secondly recited act it was enacted, that the times allowed for meal times, as provided by the said firstly recited act, should be taken between the hours of half past seven in the morning and half past seven in the evening: be it enacted, that the times allowed for such meal times as aforesaid shall be taken between the hours of half past seven in the morning and six in the evening; and, subject to such alteration as aforesaid, all the provisions of the said firstly and secondly recited acts concerning meal times and notice of meal times shall remain applicable to all young persons, and to all females above the age of eighteen years, employed in any factory.

4. And whereas by the said secondly recited act it was enacted, that in any factory in which any part of the machinery was moved by the power of water the time which should have been lost by stoppages from want of water, or from too much water, might be recovered within six months next after the stoppage, between the hours specified in the said firstly recited act as those within which time lost by drought or excess of water might be recovered, and that in order to recover time so lost any child or young person might be employed one hour in each day more than the time to which the ordinary labour of children and young persons respectively was restricted by law, except on Saturday: be it enacted that no young person, and no female above the age of eighteen years, shall, in order to recover time so lost as aforesaid, be employed after seven of the clock in the evening of any day; and the times before six of the clock in the morning and after six of the clock in the evening during which any such young person or female is so employed in any day shall not exceed one hour.

5. And whereas by the secondly recited act it was enacted, that in any factory in which any part of the machinery was moved by the power of water, when the stream was so diminished by drought or swollen by flood during any part of the day that any part of the manufacturing machinery driven by the waterwheel has been stopped by reason of such drought or flood, the young persons who would have been employed at such machinery might recover such lost time during the night next following the said day, unless the said day were Saturday; provided that no *such young person should be employed during any twenty-four consecutive hours for a greater number of hours [*546] than that to which the ordinary daily labour of such young persons in factories was otherwise restricted in law, and that no young person so employed in the night should work more than five hours without an entire cessation from work of at least thirty minutes: be it enacted, that for the purposes of the last recited enactment the word "night" shall include the whole period between six of the clock in the evening and six of the clock in the morning; and no young person, and no female above the age of eighteen years, shall be employed to recover such lost time as

last aforesaid during any twenty-four consecutive hours for more than ten hours and half of another hour; and save as hereinbefore mentioned, young persons and females may be employed to recover lost time according to the provisions of the said secondly recited act.

6. Provided always, and be it enacted, that during all or part of the period between the thirtieth day of September of any year and the first day of April of the following year, young persons, and females above the age of eighteen years, may be employed except on Saturday, between the hours of seven of the clock of the morning and seven of the clock of the evening, instead of the hours hereinbefore limited, under the following regulations and conditions; (that is to say) notice signed by the occupier of any factory, or his agent of the intention to employ young persons and females under this provision specifying the period, not being less than one month, during which they are to be so employed in such factory, shall be given to one of the inspectors of factories, and a notice to the like effect, in such form as shall be approved by such inspector, and signed by such occupier, or his agent, and by such inspector, shall be hung or fixed up and during the period specified in the notice shall be fixed up, according to the directions for other notices in the said secondly recited act, in such factory; and during the period specified in such notice young persons, and females above the age of eighteen years, may be employed in such factory after six of the clock and not later than seven of the clock in the evening of any day, except Saturday; and during the period specified in such notice (save to recover lost time as herein provided) no young person, and no female above the age of eighteen years, shall be employed in such factory before seven of the clock of the morning of any day, except Saturday; and the provisions hereinbefore contained shall, as to every day, except Saturday, during the period specified in such notice, take effect as if seven of the clock in the morning and seven of the clock in the evening were throughout substituted for six of the clock in the morning and six of the clock in the evening respectively.

7. And whereas by the said secondly recited act it was enacted, that [*547] any child above eleven years of age, employed *solely in winding and throwing of raw silk, and who shall have obtained the surgical certificate required by this act of his having completed his eleventh year, may work, without any proof of having attended a school, for any time not exceeding ten hours on any working day, but not after half past four of the clock of the afternoon of any Saturday: and whereas it is expedient that so much of the said recited act should be repealed: be it therefore enacted, that so much of the said act as is hereinbefore recited shall be and the same is hereby repealed; and in lieu thereof it shall be lawful for any child employed solely in the winding and throwing of raw silk, who shall have obtained the surgical certificate required by the said secondly recited act of his having completed his eleventh year, to be employed in all respects as young persons may be employed under this act.

8. And be it enacted, that every young person, and every female above the age of eighteen years, who shall be employed in any factory, or shall

be allowed to remain in any room where any manufacturing process is then carried on in any factory, during any part of the times which by the notice then fixed up in such factory in that behalf are mentioned as the times allowed for meals, shall be deemed to be employed contrary to the provisions of the said recited acts as amended by this act.

9. And be it enacted, that the three hereinbefore recited acts as amended by this act, and this act, shall be construed together as one act, and in all respects as if the provisions hereinbefore contained had been contained in the secondly hereinbefore recited act: provided nevertheless, that nothing herein contained shall apply to any offence committed under the said recited acts before the passing of this act, or to any proceedings taken under any of the said acts, and pending at the time of the passing of this act.

10. And be it further enacted, that this act may be amended or repealed by any act to be passed in this present session of Parliament.

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14 & 15 Vict. c. 11.

An Act for the better Protection of Persons under the Care and Control of others as Apprentices or Servants; and to enable the Guardians and Overseers of the Poor to institute and conduct Prosecutions in certain Cases.(y) [20th May, 1851.]

Whereas it is expedient to make provision for the better protection of persons who are under the care and control of *others as apprentices or servants: be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, [*548]

1. That where the master or mistress of any person shall be legally liable to provide for such person, as an apprentice or as a servant, necessary food clothing, or lodging, and shall wilfully and without lawful excuse refuse or neglect to provide the same, or where the master or mistress of any such person shall unlawfully and maliciously assault such person whereby the life of such person shall be endangered, or the health of such person shall have been or shall be likely to be permanently injured, such master or mistress shall be guilty of a misdemeanor, and being convicted thereof shall be liable to be imprisoned, with or without hard labour, in the common gaol or house of correction, for any term not exceeding three years.

2. That the costs and expenses of the prosecution of any such misdemeanor as aforesaid may be allowed and ordered by the Court before which the indictment shall be tried, in like manner as the costs of the prosecution in certain cases of misdemeanor under the act of the seventh year of the reign of King George the Fourth, chapter sixty-four, or may be allowed and ordered by the court of Queen's Bench, in case the indictment shall have been removed into that Court, to be paid by the treasurer of the county or other officer who would have been liable to pay under the order

(y) See ante, p. 117.

of the Court in which, but for such removal, the indictment would have been tried.

3. That the guardians of every union and of every separate parish under the management of a board of guardians, and the overseers of every parish not in union or under the management of a board of guardians, shall provide and keep a book or books, and shall cause to be registered therein the name of every young person under the age of sixteen who shall thereafter be hired or taken as a servant from the workhouse of such union or parish, together with several other particulars specified in the schedule hereunto annexed; and every such entry shall be signed by the presiding chairman of such board of guardians at an ordinary meeting thereof, or by some one of such overseers; provided that nothing herein contained shall be taken to supersede or affect the obligation to keep such register of poor children apprenticed by overseers or guardians as is required by the statute of the forty-second year of King George the Third, chapter forty-six, and the statute of the eighth year of Queen Victoria, chapter one hundred and one.

4. That where any young person under the age of sixteen shall have been or shall be hired or taken as a servant from the workhouse of any union or parish, or shall have been or shall be bound out as an apprentice by the guardians of any union, or guardians or overseers of any parish, it shall be lawful for *such guardians or overseers respectively and they are hereby required, so long as such young person shall be under the age of sixteen, and shall be known to them to reside as servant or apprentice in the same service into which such young person shall have so gone as a servant from such workhouse or as such apprentice within such union or parish respectively, or within five miles of any part of such union or parish, to cause the relieving officer, or, where there is no relieving officer, then some other officer duly authorized for the purpose, to visit such young person at least twice in every year, and to report to them in writing whether he has found reason to believe that such young person is not supplied with necessary food, or is subjected to cruel or illegal treatment in any respect.

[*549

5. That where any young person under the age of sixteen shall hereafter be hired or taken as a servant from the workhouse of any union or parish, or shall be bound out as an apprentice by the guardians of any union, or by the guardians or overseers of any parish, and the residence of the master or mistress shall be more than five miles from any part of such union or parish, then a written notice of such hiring, taking, or binding, specifying the name and age of the apprentice or servant, and the name, description, and residence of such master or mistress, shall be forthwith sent from such guardians or overseers to the guardians or overseers of the union or parish in which such master or mistress shall reside: and thereupon it shall become the duty of such last-mentioned guardians or overseers to cause the particulars contained in such notice to be registered in some book or books, to be provided by them for the purpose, together with the name of the union or parish from which such notice shall have been received; and such last-mentioned guardians or overseers shall cause such young person to be visited as frequently and in the same manner in all respects as if such young person had been hired

or taken from their own workhouse, or had been bound out as an apprentice by themselves.

6 That where any complaint shall be made of an offence against this act, or of any bodily injury inflicted upon any poor person under the age of sixteen years, for which the party committing it is liable to be indicted, and the circumstances of which offence amount in point of law to a felony or an attempt to commit a felony, or an assault with intent to commit a felony, and two justices of the peace before whom the examination is taken shall certify under their hands that they deem it necessary for the purposes of public justice that the prosecution should be conducted by the guardians of the union or of the parish, or where there are no guardians by the overseers of the parish, in which the offence shall have been committed, such guardians or overseers, as the case may be, shall upon personal service of such certificate or a duplicate thereof upon the clerk of such guardians, or upon any one of such overseers, conduct the prosecution, and shall pay the costs reasonably and properly incurred *by them therein (so as the same shall not be allowed to them under any order of the Court trying the indictment, or [*550] of the Court of Queen's Bench), out of the common fund of the union, or out of the funds in the hands of the guardians or overseers (as the case may be) of such parish.

7. That in the case of a union or parish under a board of guardians the clerk or some other officer of such union or parish, and in the case of a parish not under a board of guardians one of the overseers thereof, may, if such two justices of the peace before whom the examination is taken shall deem it necessary for the purposes of public justice and shall certify as hereinbefore mentioned, be bound over to prosecute.

8. That the words "guardians," "union," "overseers," "justices of the peace," "officer," "poor," "parish," and "workhouse," used in this act, shall be construed in like manner as in the act of the fifth year of the reign of King William the Fourth, chapter seventy-six.

9. That this act shall extend only to England and Wales.

SCHEDULE.

Form of Register

Name of Child.	Age.	Date of hiring or taking as Servant.	Name of Master or Mistress.	Trade or other description of Master or Mistress.	Residence of Master or Mistress.

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